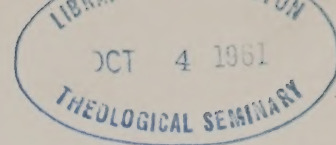


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THE MEDIEVAL THEORIES OF THE JUST PRICE

Romanists, Canonists, and Theologians in the
Twelfth and Thirteenth Centuries

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PREFACE

We are like "puny dwarfs perched on the shoulders of giants. . . . We see more and farther than our predecessors, not because we have keener vision or greater height, but because we are lifted up and borne aloft on their gigantic stature." This metaphor of Bernard of Chartres preserved by John of Salisbury was a commonplace in the twelfth century, yet to a present-day beginner in medieval studies it remains strikingly appropriate. My reliance on the works of others is apparent from the footnotes and bibliography, but here it is also appropriate to acknowledge my many personal obligations.

In America I benefited from the interest and help of four distinguished medievalists who consented to read the manuscript in entirety and to offer criticism from their particular fields of interest. If I have fallen into error, it is only because I have not heeded their warnings. Professor Stephan Kuttner of the Catholic University of America advised me on matters of medieval Roman and Canon law, a field in which his authority can hardly be surpassed. Professor Frederick C. Lane of the Johns Hopkins University and Professor Raymond de Roover of Boston College contributed from their extensive knowledge of medieval economic practice. To Professor Sidney Painter of the Johns Hopkins University I owe my introduction to and formation in medieval studies, and I wish to express my special gratitude for his constant aid and counsel throughout this project.

In Paris I profited from the friendly advice of M. Gabriel LeBras, Professor at the Faculté de Droit; Abbé Louis Guizard, Professor at the Institut Catholique; Msgr. Charles Lefebvre, now of the Sacra Romana Rota; M. Pierre Legendre, now Professor at the Faculté de Droit, Université de Lille; and Mr. Clemens Heller of the Centre de Recherches Historiques. Especially were my labors in the manuscripts

made more fruitful and pleasant through the kindness and assistance of Mlle d'Alverny and Mme Rambaud-Buhot of the Bibliothèque Nationale.

The major research for this study was made possible through the Fulbright program effectively administered by the Commission Franco-Américaine d'Échanges Universitaires. Later opportunity to verify manuscript sources in France was provided by a grant from the Faculty Research Fund of the Horace H. Rackham School of Graduate Studies, the University of Michigan. Finally, I am indebted to the American Philosophical Society for undertaking the publication.

Because of the high cost of printing foreign languages in this country I have felt it wise to limit the amount of Latin texts in the footnotes to a minimum. Therefore, the Latin quotations derived from printed editions, both early and recent, have been eliminated with two occasional exceptions: first, texts of which precise grammatical phrasings were essential to my analysis, and second, texts derived from early printed editions virtually impossible to obtain anywhere in this country. Latin quotations excerpted from unedited manuscripts, however, have been printed in full. These last quotations do not attempt to provide critical editions of the passages because of the great number of treatises involved. Of some treatises I have had access to only one manuscript. Of others I have consulted all of the manuscripts available in Paris, and constructed a text based on the two best ones. In these references the two manuscripts have been cited, but the actual passage printed represents the combined reading that makes the best sense. A full list of the manuscripts employed in this study may be found in the bibliography.

J. W. B.

Ann Arbor, Michigan
31 October, 1958

ABBREVIATIONS AND EXAMPLES OF CITATIONS

- C.**—Code of Justinian.
 Source: *Corpus iuris civilis*, Vol. II, P. Krueger, ed. Berlin, Weidmann, 1914.
 Example: C. 4, 44, 10—Liber 4, Titulus 44, Lex 10. (pr.—principium and par.—paragraph).
- Causa**—Causa in Pars secunda of Gratian's *Decretum*.
 Source: *Corpus iuris canonici*, Vol. I, A. Friedberg, ed., Leipzig, 1879.
 Example: Causa XIV, q. 3, c. 4, *Usura*—Pars secunda, Causa 14, Questio 3, Canon 4, Incipit *Usura*.
- Comp.**—*Compilatio antiqua*.
 Source: *Quinque compilationes antiquae*, A. Friedberg, ed., Leipzig, 1882.
 Example: *Comp.* I: III, 15, c. 4, *Quum dilecti*—*Compilatio antiqua* I, Liber 3, Titulus 15, Canon 4, Incipit *Quum dilecti*.
- C.Th.**—Theodosian Code.
 Source: *Theodosiani libri XVI*, 2 v. T. Mommsen and P. Meyer, ed., Berlin, Weidmann, 1905.
 Example: C.Th. 3, 1, 1—Liber 3, Titulus 1, Lex 1.
- D.**—Digest of Justinian.
 Source: *Corpus iuris civilis*, Vol. I, T. Mommsen and P. Krueger, ed., Berlin, Weidmann, 1920.
 Example: D. 47, 11, 6—Liber 47, Titulus 11, Lex 6. (pr.—principium and par.—paragraph).
- De poen.**—De poenitentia of Quaestio III, Causa XXXIII of Pars secunda of Gratian's *Decretum*.
 Source: *Corpus iuris canonici*, Vol. I, A. Friedberg, ed., Leipzig, 1879.
 Example: *De poen.* V, c. 2, *Qualitas*—Distinctio 5, Canon 2, Incipit *Qualitas*.
- Di.**—Distinctio in pars prima of Gratian's *Decretum*.
 Source: *Corpus iuris canonici*, Vol. I, A. Friedberg, ed., Leipzig, 1879.
 Example: *Di.* XLVII, c. 2, *Quoniam*—Pars prima, Distinctio 47, Canon 2, Incipit *Quoniam*.
- Inst.**—Institutes of Justinian.
 Source: *Corpus iuris civilis*, Vol. I, P. Krueger, ed., Berlin, Weidmann, 1920.
 Example: Inst. 3, 23—Liber 3, Titulus 23. (pr.—principium and par.—paragraph).
- M.G.H.**—*Monumenta Germaniae historica*, edidit Societas aperiendis fontibus rerum Germanicarum medii aevi.
- Nov.**—Novellae of Justinian.
 Source: *Corpus iuris civilis*, Vol. III, W. Kroll, ed., Berlin, Weidmann, 1912.
 Example: Nov. 120, c. 9—Novella 120, Capitulum 9. (pr.—principium and par.—paragraph).
- Paris Bibl. Nat. Lat.**—Manuscript from Paris. Bibliothèque Nationale, Fonds Latin.
- Paris Mazar.**—Manuscript from Paris, Bibliothèque Mazarine.
- P.G.**—*Patrologiae . . . series Graeca*, 166v. J. P. Migne, ed., Paris, 1857–1866.
- P.L.**—*Patrologiae . . . series Latina*, 221v. J. P. Migne, ed., Paris, 1844–1865.
- Thomas, Sum. theo.**—Thomas Aquinas, *Summa theologica*.
 Source: *Opera omnia*, 25v. Parma, 1852–1873, reprinted at New York, Musurgia, 1948–1950.
- Abbreviations:**
 I, II—Pars prima-secundae.
 II, II—Pars secunda-secundae.
 qu.—Quaestio.
 a.—Articulus.
 obj.—Objectum.
 resp.—Respondeo.
 ad—Argumentum ad objectum.
 Example: Thomas, *Sum. theo.* II, II, qu. 77, a. 1, ad 1—Pars secunda-secundae, Quaestio 77, Articulus 1, Argumentum ad primum objectum.
- X**—*Decretales* of Gregory IX.
 Source: *Corpus iuris canonici*, Vol. II, A. Friedberg, ed., Leipzig, 1881.
 Example: X: V, 32, c. 1, *Intelleximus*—Liber 5, Titulus 32, Canon 1, Incipit *Intelleximus*.
- An example of citation in the glosses and apparatus to legal material: Accursius, *Glossa ordinaria* to *elegerit*: C. 4, 44, 2.—The gloss of Accursius to the word *elegerit* in the Code of Justinian, Liber 4, Titulus 44, Lex 2.

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INTRODUCTION

Since 1867 when Karl Marx rudely confronted the Western world with his *Das Kapital*, the origins of capitalism have been the object of great interest to students of economic and social history.¹ Although Marx virtually initiated modern interest in the theoretical analysis of capitalism, it was not until the turn of the twentieth century that serious work was begun on the historical origins of capitalism. The pioneer in this field was undoubtedly Werner Sombart, whose work *Der Moderne Kapitalismus* became an important source of influence and controversy for the problem.² Scholarly interest in the origins of capitalism almost approached the level of excitement, when two years after the first edition of Sombart, Max Weber published his provocative essay *Die Protestantische Ethik und der Geist der*

Kapitalismus.³ Weber and later his English interpreter, R. H. Tawney,⁴ attempted to explore generally the relations between religion and economic behavior and particularly the influence of Protestantism on capitalism. Sombart and Weber opened the dikes and a great flood of controversial literature inundated modern scholarship.⁵

Sometime vaguely between the end of the Middle Ages and the beginning of the Modern Period, according to the influential views of Sombart and Weber, there emerged the unique phenomenon of modern capitalism. Trading activity increased rapidly. A money economy became widespread. New instruments of trade, banking, credit and business organization were created. In short, Western Europe was pictured as passing from the darkness of medieval economic lethargy to the dawn of

¹ Hamburg, 1867; 2nd edition by Marx, 1873; 4th edition by Friedrich Engels, 1890.

² Leipzig, Duncker und Humblot, 1902; 6th edition, Leipzig and Munich, 1924.

³ *Arch. f. Sozialwiss. u. Sozialpol.* 20, 1904, and 21, 1905. English translation by Parsons, *Protestant ethic*.

⁴ *Religion and rise of capitalism*.

⁵ For a sample of this literature, see Tawney's foreword to Parson's translation of Weber's *Protestant ethic*, 4, 5.

modern commercial and industrial vigor. These origins of modern capitalism, however, comprised more than the quickened tempo of economic activities; they also implied the emergence of a unique mental attitude towards economic activity. Sombart and Weber perceived a "spirit of capitalism" which distinguished the new phenomenon from preceding ages. According to Sombart the new "spirit" was dominated by the principle of pursuit of gain or acquisition (*Ewerbsprinzip*), which formed the central core of economic rationalism of capitalism.⁶ Weber and his school attempted to show that certain Protestant ethics and ideals, particularly those of the Puritans, produced a mental atmosphere significantly different from that of the Middle Ages and highly conducive to the growth of capitalism. Capitalism was born into the Modern Age not only with an improved body but also with a "spirit" or personality of its own.⁷

If capitalism was a new movement originating sometime during the late Middle Ages and the early Modern Period, then it must follow that the preceding epoch of the Middle Ages possessed significantly contrasting characteristics. Those students interested in the historical origins of capitalism were obligated to devote a certain attention to the preceding period in order to highlight the characteristics of the new phenomenon, and for a while the study of the Middle Ages became an academic handmaiden to that of modern economic history. Moreover, the mistress bequeathed certain methodological devices to her servant. To present capitalism in the garb of a "spirit" is to analyze capitalism by means of an ideal type or system, and to contrast the "spirit of capitalism" with the

Middle Ages is to imply that the earlier period also possesses a certain "medieval or feudal spirit."⁸

Sombart painted the economic life of the Middle Ages or the "Precapitalistic Age" in rather dark colors, and his tableau agreed substantially with the general assessments of economic historians of his day.⁹ The medieval economic "spirit" was characterized by "traditionalism" and "handicraft economy." In contrast to the age of capitalism and its principle of striving after unlimited acquisition, the dominating medieval principle was mere provision for one's needs (*Bedarfsdeckungsprinzip*). By modern standards the volume of trade was exceedingly small. Sombart offered the comparison that the volume of goods carried annually over St. Gotthard's Pass at the end of the Middle Ages would only fill one or two modern freight trains.¹⁰ Although wholesale and international trade may have been influential in certain limited areas, the greater part of Western Europe saw only local and retail trading on a small scale and by primitive means. If a natural economy based on barter exchanges was not totally universal, at least the role of money in commercial transactions was relatively slight. The techniques and instruments of business were appropriately crude. Banking, credit, and business organization were relatively undeveloped. The chief device which best characterized the commercial and industrial organization of the Middle Ages was the guild system. The guilds generally performed the functions of privilege, regulation, and control and were considered to be typical of the medieval sustenance and handicraft economy. Although Sombart's view of the Middle Ages was never free from criticism at individual details, nonetheless his comprehensive picture has been widely accepted until recently by the general economic histories of the Middle Ages.¹¹

In harmony with these outlines of the traditional and primitive character of the Middle Ages were two representative economic doctrines: usury and the just price. The prohibition of usury was seen as a peculiar aberration and indicative of the medieval incapacities in economic affairs. The doctrine of the just price, on the other hand, was considered to be most char-

⁶ Sombart's main conceptions are conveniently summarized in his article in *The Encyclopedia of the Social Sciences*, v° Capitalism. They were popularized for American readers in Nussbaum, Frederick L., *A history of the economic institutions of modern Europe*, New York, F. S. Crofts, 1933.

⁷ The concept of the "spirit of capitalism" is fundamentally a problem of method. Sombart believed that every economic system possessed a form of organization, a technique, and a mental attitude or spirit. While Sombart used the "spirit of capitalism" as a tool of analysis for historical data, he probably also believed in the historical reality of this spirit. On the other hand, the methodology of Weber was more refined. For him the "spirit of capitalism" was an "ideal type" or a special instrument of sociological analysis to promote understanding of concrete historical reality. It was a special construction of the mind designed for isolating and examining a specific historical problem and not for studying the total reality. More important, it was purposely fictitious, never serving as an end, but only as a means of controlling historical evidence for comparative analysis. Because of certain ambiguities Weber's method was open to misinterpretation, although in fairness to him, it should be stated that he did not hold to the historical reality of the "spirit of capitalism" in the same manner as Sombart. Among the literature concerning Sombart's and Weber's method, see Parsons, Talcott, "Capitalism" in recent German literature: Sombart and Weber, *Jour. Polit. Econ.* 36: 641-661, 1928, and 37: 31-51, 1929, and Fischhoff, Ephraim, The Protestant ethic and the spirit of capitalism: a history of a controversy, *Soc. Res.* 11: 53-77, 1944.

⁸ Cf. the criticism of this method in Schumpeter, *History of economic analysis*, 80.

⁹ Weber did not go into an original and detailed analysis of precapitalism; rather he accepted the major conclusions of Sombart's work. Cf. Weber, *Arch. f. Sozialwiss. u. Sozialpol.* 22: 348, 1906, translated in Gerth, H. H., and C. Wright Mills, *From Max Weber: essays in sociology*, 66, New York, Oxford University Press, 1946, and generally throughout Weber, *General economic history*.

¹⁰ Sombart, *Der moderne Kapitalismus* 1: 282 and repeated in Weber, *General economic history*, 209, 210.

¹¹ Chief among the criticisms has been that Sombart generalized too much from the German economy which was retarded during the Middle Ages. For a bibliography of Sombart's critics, see Postan, M. M., Medieval capitalism, *Econ. Hist. Rev.* 4: 212-227, 1933.

acteristic of the "spirit" of medieval economy. Simply stated, the just price was essentially determined by the cost of production. It consisted of the sum total of material costs necessary for producing goods plus a reasonable wage to maintain the craftsman or merchant in his appropriate station of life. It represented an objective value which was inherent in the nature of the goods. This conception of the medieval just price has been widely held and has fitted well with the modern picture of the Middle Ages.¹² Because of the sluggish nature of the medieval economy, it was possible to compute effectively a just price. The markets were local, the buyers few, the supply of goods either known or elastic, and a cost-of-production price was possible. Finally, the doctrine of the just price harmonized well with the medieval regulated economy and the guild system.

The doctrine of the just price also attracted particular attention from another influential group of writers, the varied critics of capitalism.¹³ Certain socialists and religious thinkers invoked the "spirit" of the Middle Ages and some of its institutions as the remedy to the sins and misfortunes of rampant capitalism. To them the just price conceived as the cost of production seemed worthy of revived consideration. Many of them were interested in the element of labor involved in the theory. Here they saw an objective standard of value which contrasted with the subjective theories of utility and the like on which a free market

or capitalistic economy was based, and to which they were opposed. In their analysis of the medieval theory they proposed that labor was the chief source of human wealth and the chief claimant to remuneration. Basically the just price must compensate costs and labor expended in the production of goods. In the medieval doctrine, however, labor was not rewarded equally but according to the position of the worker in the social hierarchy which was divinely ordained. Although some rejected the aristocratic gradation of society, many of these writers hailed the medieval emphasis upon labor as the true forerunner of the labor theory of value. In the enthusiastic words of R. H. Tawney, "The last of the schoolmen was Karl Marx."¹⁴

In recent decades students of history have begun a revision of the general economic picture of the Middle Ages. Certainly not all of the details of the tableau have been altered, but a significant shift in emphasis has resulted. Sombart's jibe about merchandise carried over St. Gotthard at the end of the Middle Ages still stands. Measured absolutely the amount of trading activity was small, yet considered relatively it assumes new significance. Beginning towards the middle of the eleventh and reaching a peak towards the end of the thirteenth century Western European commerce experienced a sharp rise. The business leaders of the period were undoubtedly the Italians, but the general effects of economic progress were felt in varying degrees throughout the West. More important was that the general increase in trade was accompanied by many significant inventions or improvements in the fields of commerce and finance. Techniques formerly thought to be characteristic of the capitalistic age, such as partnerships, joint liability, deposit and exchange banking, letters of credit, bills of exchange, bookkeeping, and insurance are now found to have their origin or revival in the Middle Ages. The notorious usury restrictions have been discovered to be not nearly as damaging to credit in actual medieval practice as they might have appeared in theory.¹⁵ Indeed, some recent writers have been so bold as to snatch the term "Commercial Revolution" from the Early Modern Period and apply it to the period in Italy from the eleventh through the thirteenth centuries.¹⁶

If these recent students are correct in giving greater emphasis to the vigor and originality of the economic life of the Middle Ages, how does the doctrine of the just price fit into this picture? This doctrine, conceived as the cost of production, agreed well with a

¹² The literature espousing this conception of the just price is too numerous to include a complete list. It was expounded by Weber himself in his lectures of 1919, 1920, reproduced in *General economic history*, 358, and by his disciple Troeltsch, *Social teachings* 1: 319, 320. It was current in general accounts of the economy of the Middle Ages such as the influential Ashley, *English economic history* 1: 138-147; Cunningham, William, *The growth of English industry and commerce during the early and Middle Ages* 1: 233-235, Cambridge, 1890; Knight, Melvin M., *Economic history of Europe to the end of the Middle Ages*, 217, Boston, Houghton Mifflin, 1926; and Thompson, James W., *An economic and social history of the Middle Ages*, 696, 697, New York, Century, 1928. More recently it has been adopted by the standard textbooks on economic thought such as: Whittaker, Edmund, *A history of economic ideas*, 410-413, New York, Longmans, Green, 1940; Neff, Frank A., *Economic doctrines*, 43, New York, McGraw-Hill, 1950; Bell, John F., *A history of economic thought*, 65-68, New York, Ronald Press, 1953; and Roll, Eric, *A history of economic thought*, 46, 47, Englewood Cliffs, N. J., Prentice-Hall, 1956. It has penetrated more scholarly monographs such as Gras, N. S. B., *Economic rationalism in the late Middle Ages*, *Speculum* 8: 304-312, 1933, and most recently, Shawver, Donald L., *The development of theories of retail price determination in England and the United States*, ch. 1, Illinois Studies in the Social Sciences 39, 1956.

¹³ This interest in the just price is perhaps best represented by the article of Edgar Salin in *The Encyclopedia of the Social Sciences*, v° Just Price. Other examples: Demant, *The just price*, Tawney, *Religion and rise of capitalism*, Fanfani, Amintore, *Catholicism, Protestantism, and capitalism*, 26, New York, Sheed and Ward, 1936; and Clune, George, *The medieval guild system*, 54-58, 278, Dublin, Brown and Nolan, 1943.

¹⁴ *Religion and rise of capitalism*, 39. This thesis was carefully worked out by Hagenauer, *Das "justum pretium."*

¹⁵ Cf. Noonan, *Scholastic analysis of usury*, Saporì, *Studi* 1: 181-189, and Nelson, Benjamin N., The usurer and the merchant prince, *Jour. Econ. Hist.* 7 (Supplement): 104-122, 1947.

¹⁶ *Cambridge economic history* 2: 155 ff. and 289 ff., and Lopez, Robert S., and Irving W. Raymond, *Medieval trade in the Mediterranean world*, 6, 50, New York, Columbia University Press, 1955.

medieval economy thought to be generally static and lethargic. Hence it seems appropriate to reopen the problem of precisely what the influential medieval thinkers meant by the doctrine of the just price.

The term "just price" is almost as old as existing commercial records and probably as old as economic exchange itself. An ancient stele, for example, from a Babylonian market place not long after the time of Hammurabi contained the expression.¹⁷ Yet its usage is as modern as the sign over a buffet in Gare St. Lazare in Paris today, where travelers have their refreshments "*au juste prix*." Such terms as the "just price" or "true worth" or "real value" or "reasonable estimate" have undoubtedly possessed many and varied meanings throughout their long existence, but during the Middle Ages they acquired a special significance. Beginning chiefly with the twelfth and lasting until the sixteenth century the thinkers of the Middle Ages adopted the term *justum pretium*, refined its meaning, and enlarged its importance until the expression became a legal device, a moral imperative, and an economic doctrine.

As venturers into the study of economics, the writers of the Middle Ages differed in one important respect from their modern counterparts. Economists today seem to be primarily interested in how economic phenomena operate. They examine what causes inflation or the factors of unemployment or how supply and demand help to determine prices. Only secondary are their evaluations of the rightness or justice of the phenomena they have discovered.¹⁸ In sharp contrast to the modern scientific or analytical approach to economics, the medieval writers, both legists and theologians, studied economic phenomena primarily from the normative point of view. Theirs was the task of judging the legal or moral fitness of the situation they found. In matters of price the lawyers, both Roman and Canon, concerned themselves chiefly with a just and legally enforceable system of sale. They examined the phenomena of sale with the view of determining licit or illicit contracts. On the other hand, the theologians, who thought in terms of first principles, attempted to construct an all-embracing system of human ethics in which the virtue of justice formed the foundation of the good life on earth. For them the doctrine of the just price was the result of the penetration of justice into the world of commerce. Whether legist or theologian the medieval writer was more interested in evaluating the economic system than discover-

ing how it worked. Although the motive of these thinkers was not pure scientific curiosity, nonetheless they were obligated to understand something of what they wished to judge, and this requirement produced a certain amount of rudimentary economic analysis. For example, the Canonists of the twelfth century in determining the immorality and illicitness of profits derived from contracts of usury were required to pass judgment on profits derived from other contracts. In liberating economic increment derived from hire, barter or sale from the stigma of usury they found it necessary to make an introductory analysis into the nature of profits.¹⁹ On the whole, however, the approach of medieval thinkers was essentially normative.²⁰

The boundaries of this investigation of the just price during the Middle Ages have been set by a combination of various factors. First of all, there are the participants in the debate, or the writers who treated the subject. In a great number of modern studies on the problem, the just price is called a "Canonist doctrine."²¹ Applied to the writers of the twelfth and thirteenth centuries this terminology is actually inaccurate. At least three groups of medieval writers must be distinguished according to the objects of their study: the theologians, the Roman lawyers, and the Canon lawyers. In reality only the theologians advocated the complete enforcement of the just price. The Romanists, on the other hand, maintained an opposing theory of freedom of bargaining. The Canonists, while making certain ethical evaluations, sided with their legal colleagues, the Romanists. In the thirteenth century a keen debate on the subject resulted from the *lex divina* of the theologians which maintained the just price and the *leges humanae* of the legists which advocated freedom of bargaining. In this debate the theologians discovered their opponents to be not only the Romanists, but also the Canonists. Although the problems of sale were primarily legal and were developed to the fullest by the jurists, the true champions of the complete enforcement of the just price during the Middle Ages were the theologians.

The geographical boundaries of this study are more difficult to determine precisely. This difficulty is due to the fact that, if a universal "republic of letters" ever existed in Western Europe, it was during the Middle Ages. Latin was the universal medium of communication among the educated classes, and the Church was the universal sponsor of learning. Because of these two general factors, scholars circulated widely and freely in all parts of Catholic Christendom. The

¹⁷ "Adda Paksu / pasteur de Susinak / fils de la sœur de Silhaha / une stèle ("de) justice" / fabriquée, — / dans le "Marché" / (la) dressa; / quiconque un prix "juste" / n'a pas obtenu / que Samas le lui fasse obtenir!" Adda Paksu was a contemporary to Ammizaduga, the fourth successor to Hammurabi. Scheil, *Mémoires* 28: 5, 1939.

¹⁸ Cf. the emphasis in Schumpeter, *History of economic analysis*, 3 ff.

¹⁹ See below, p. 39 ff.

²⁰ Schumpeter, *History of economic analysis*, 102; de Roover, *Quar. Jour. Econ.* 69: 162, 163, 1955.

²¹ Schumpeter is a recent exception. In his *History of economic analysis*, 78 ff. he terms the medieval writers as scholastics or university professors. Noonan, *Scholastic analysis of usury*, 5, also follows this terminology.

men who formed the ranks of the Romanists, Canonists, and theologians came from Italy, France, England, Spain, Germany—in short, all of Western Europe. In each of the three disciplines they worked as international teams to solve their common problems. Although the fields of recruitment were far-spread, the places of training were more localized. Two centers of learning are of special importance to our investigation. The oldest of these was the university at Bologna which was the center of legal studies in Western Europe. The study of both Roman and Canon law during the Middle Ages originated there, and Bologna became the principal fountainhead for medieval theories of law. In the domain of theology, Paris was queen, and from her university flowed the most vigorous currents of theological thought. Although other centers of learning made minor contributions, Bologna and Paris attracted the best legal and theological minds of Europe, and hence, they constitute as closely as possible the geographical setting for the medieval theories of the just price.

The chronological limits of this investigation have been treated somewhat arbitrarily. The terminating date has been set at and including the writings of Thomas Aquinas, which were completed around 1273. Contemporary with him and also serving as terminal points in their respective fields are Odofredus (d. 1265) of the Romanists and Hostiensis (d. 1271) of the Canonists. Aquinas has been chosen because the great majority of modern studies on the just price begin with him and examine the writers of the fourteenth and fifteenth centuries, when the sources are more readily accessible in printed editions.²² This investigation of the just price, therefore, has attempted to trace the medieval origins and development of the doctrine in the period before Thomas Aquinas, when the sources are in a less advanced state of publication. The starting date, however, of this historical study may not be fixed so arbitrarily. For the medieval period before Aquinas the inquiry may be limited to the twelfth and thirteenth centuries, except for a brief look at the Carolingian period in the ninth century. Serious study of Roman and Canon law in the Middle Ages did not begin until the emergence of the schools at Bologna at the beginning of the twelfth century. Although theology was discussed throughout all of the Middle Ages, treatment of ethical questions of a practical nature such as the just price appears not to have been developed until the influence of the universities had been felt at the turn of the twelfth and the thirteenth centuries.²³ Therefore, the jurists must be studied

from the beginning and the theologians from the end of the twelfth century.

Even these starting points of the study of the medieval theories of the just price are inadequate. In some measure the historian of an idea or institution of a certain period is held responsible also for that which precedes his period of particular interest. Although the economic idea of the just price may be studied largely as a phenomenon of the Middle Ages, much of its medieval development is illuminated by research into Greek and Roman Antiquity. For the purposes of this study three major legacies of the Greek and Roman civilization to the Middle Ages have been selected for a preliminary chapter: the theory of exchange of Aristotle, the mistrust towards merchants and mercantile practices of the Church Fathers, and the legal system of sale of ancient Roman law. No attempt has been made to reconstruct the ancient conceptions of sale and price as they actually existed. Such an attempt would involve quite another study in itself. This investigation has chosen rather those aspects of Antiquity which the medieval thinkers themselves selected from the past and has examined those ancient legacies in the light of their subsequent development.

The subject matter of this study has been limited by what questions have been asked. A whole cluster of related ideas cling to the medieval theories of price. In order to make the scope of the subject matter a reasonable undertaking, most of the peripheral problems have been sheared away. Only those questions which bear directly on the central theme have been considered. At times the pruning of related subjects may seem arbitrary. For example, the more general legal problems of sale, such as the formation of contracts, the problem of risk, the obligation of buyers and sellers, and the protection of special parties, have been necessarily omitted. Moreover, the problem has been limited to private contracts of sale, thereby excluding all public sales. The central and decisive question of the investigation has been: What were the medieval theories concerning the determination of price? In view of the normative character of medieval analysis this question does not mean: How were prices economically determined in actual practice? but: What prices were legitimate or ethical? Since the doctrine of the just price was not the only theory, and perhaps not even the most prevalent theory of the Middle Ages, this study has been equally an examination of competing theories such as freedom of bargaining and the special remedies of *laesio enormis*. Where the just price was pertinent, another central inquiry has been: How was the just price estimated? Other related and necessary problems to medieval price determination have been: How did fraudulent actions affect sale?

²² A survey of the standard works on the just price found in my bibliography of Secondary Studies will show that there has been an invariable neglect of the period from the Church Fathers to Thomas Aquinas.

²³ This conclusion has been my experience in examining the theological material preceding the thirteenth century. Cf. also

Brandts, *L'économie politique*, 4, cited in O'Brien, *Medieval economic teaching*, 14.

What was the relation between usury and sale? and Were profits derived from merchandising activities legitimate?

As an introduction to the medieval theories of the just price, one final warning should be issued. The word "theories" is used advisedly and is significant. In any age, and the Middle Ages was hardly an exception, theory is no guarantee of practice. Neither the ideals of social leaders, nor even laws on the statute books represent exactly the conditions of the times. What was the actual determination of prices in any specific place at any specific time is quite another problem. To read the theories of the Romanists, Canonists, and theologians is a comparatively simple task. To be confident of their application in the world of affairs involves a more difficult investigation. Until the actual economic, legal, and political conditions of the times have been thoroughly examined, our impression of the application of the medieval theories remains only hypothetical guesswork.

We can assume, for example, that most of the doctrines of the theologians and some of the Canonists were designed to be applied in the *forum internum* or the confessional. This enforcement, although undoubtedly of influence, gives no assurance that the penitent merchant followed the ideals of his confessor. Even the extent of the influence of Roman law is difficult to determine in the actual practice of lay courts. Of course, from the standpoint of general jurisprudence the influence of the medieval Romanists has been detected in such legal systems as that of Bracton in England, the Coutume de Beauvaisis of Beaumanoir in France and the late medieval jurists in Germany.²⁴ Suggestions of influence are one thing but actual enforcement of specific laws of sale in definite localities is quite another. Were the Roman law theories of freedom of bargaining and *laesio enormis* legally enforced in the lay courts of Paris or London or anywhere else during the twelfth and thirteenth centuries? Only according to the extent that the problem has been studied can a tenuous and general answer be ventured to this question. Perhaps the Roman law of sale was enforced in Italy, almost certainly in Bologna. It is possible that it was observed in southern France or *le pays de droit écrit*, but not likely in the Imperial courts of Germany where cases of sale were probably treated in the local courts. Of northern France, or *le pays de droit coutumier*, England and Scandinavia, little is known of the actual exercise of Roman law. In all of these areas the records of the lay courts must be studied carefully in order to determine the exact extent of practices of Roman law. Only in one domain may we speak with somewhat greater assurance. The Canon lawyers adopted, as we shall see, the complete system of sale of Roman law at the turn of the twelfth and thir-

teenth centuries and sought to apply these principles in the ecclesiastical courts or *fora externa*. These courts were made uniform and universal by the training of the Canonists and by the primacy of the Roman See, and probably gave the Roman law theories of price determination their widest enforcement throughout Western Europe.

1. THE LEGACY OF ANTIQUITY

I. ARISTOTLE—A THEORY OF EXCHANGE

In the fourth century B.C. Aristotle formulated a conception of justice and economic exchange that has been a source of stimulation and controversy to economic theorists up through modern times. One of the climactic eras of his prestige occurred during the thirteenth century, when his ideas were greatly influential in the writings of the medieval schoolmen. The doctors of the thirteenth century, as for example Albert the Great and Thomas Aquinas, rehabilitated the teachings of the Greek philosopher and incorporated them into their systems of scholastic philosophy. During this period the Aristotelian theory of justice and economic exchange was officially revived, probably misinterpreted, but employed as a philosophical justification for the medieval doctrine of the just price.

Fundamentally the theory of justice and economic exchange of Aristotle was a specific case in point of a general conception of moral virtue. As Aristotle explained carefully in the second book of the *Nicomachean Ethics*, the underlying principle of virtuous human conduct was the refraining from extreme actions. In essence moral virtue was a life of moderation or the mean state, which avoided excesses and defects of human conduct. For example, in the realm of fears and confidence, courage was a virtue, because it fell between the excess of rashness or the defect of cowardliness. In giving and taking wealth, liberality was a virtue which took the middle course between prodigality and stinginess, or in the matter of social relations friendliness was a virtue which stood between flattery and quarrelsomeness. This basic ethical principle that virtue was a mean state expressed analogously in quasi-mathematical terms was to have further ramifications in a theory of justice and economic exchange.

According to Aristotle in Book Five of the *Ethics*, the relationship of justice to moral virtue was twofold. Generally conceived, justice was not a part of virtue but co-extensive with virtue. In this sense a just man was one who kept the mean state of conduct and was equivalent to a virtuous man. In another sense, however, justice was considered as a part of general virtue and was known as Particular Justice. Although this category pertained to the more specific affairs of life, it was still closely related to the fundamental principles of Aristotle's general justice and moral virtue. The principle underlying Particular Justice

²⁴ Cf. the discussion of Vinogradoff, *Roman law, passim*.

was also conceived in mathematical terms as an equality or a mean. This equality was not a strict one, but rather an equality of ratios. The mean of Particular Justice became a kind of mathematical proportion based on the condition of the people to whom justice pertained. Equal things were given to people equal in status, while unequal things were given to unequals.¹ To illustrate this fundamental principle of the mean or proportion, Aristotle divided Particular Justice temporarily into two categories: Distributive Justice and Corrective Justice.

The relationships among people of differing status are regulated by Distributive Justice. Wealth and honor are shared by men according to their relative condition in society. Aristotle illustrated this principle by citing the case of dividing common property in a partnership. The division of shares bears the same proportion to the original contributions in the partnership. Likewise the distribution of honor is accomplished in relation to the status of the members of society, the ruler being granted accordingly more honor than the meanest citizen. The mathematical ratio that expresses the proportional principle in Distributive Justice is the geometric mean—hence, unequals to unequals.²

Corrective Justice, on the other hand, governs the relations between members of society who are equal in status. These relationships may be further subdivided into two groups: the voluntary, such as buying and selling, borrowing and hiring, and the involuntary, such as rape, assassination, false witness, plundering, etc. Since the differing status of the individuals does not have crucial importance, these activities are judged on the basis of strict equality. In Corrective Justice the judge attempts to assess the gains and losses of both parties and to arrive at a strict equality by removing from the gain and adding to the loss. In this manner justice is achieved through the mathematical ratio of the arithmetic mean.³ In dividing justice into Distributive and Corrective, Aristotle has been seen to represent the antithesis between nature and convention in Greek society of the fourth century. These two opposing principles of justice reflected the contemporary conflict between landholders who wanted natural, unequal justice and the mercantile classes who wanted equal justice for furthering business relations.⁴

From the time of Albert the Great and Thomas Aquinas in the thirteenth century to our modern day, commentators of the *Nicomachean Ethics* have maintained that Aristotle divided Particular Justice only into the two above categories. After completing a preliminary discussion of the two species of justice, however, Aristotle went on to propose another type of

justice, that of Reciprocation. Furthermore, he stated that:

this simple Reciprocation will not fit on either to the Distributive Justice, or the Corrective . . . but in dealings of exchange such a principle of Justice as this Reciprocation forms the bond of union, but then it must be Reciprocation according to proportion and not exact equality. . . .⁵

One modern commentator has suggested that Aristotle meant to include a third category of justice which governed the activity of economic exchange and operated according to a combination of the mathematical ratios of Distributive and Corrective Justice.⁶ Recent examination of Greek mathematical theory contemporary to Aristotle's period has produced additional evidence to confirm this new interpretation. It now appears that Pythagorean philosophy had a definite mathematical conception of Reciprocation. Archytas' work *On Music*, known to Aristotle, described three mathematical proportions termed the arithmetic, the geometric, and the harmonic. From Archytas' account of these three ratios, it appears as if the mathematical formulae for Aristotle's divisions of justice reflected them perfectly. The harmonic corresponded to what Aristotle called the Reciprocal. Furthermore, two additional pseudo-Archytas writings applied the principle of "reciprocal proportion" to political and economic life in a manner analogous to Aristotle's use of Reciprocal Justice in economic exchange.⁷ Although the actual text of the *Ethics* will never be completely free from ambiguity, it is a reasonable conjecture that Aristotle divided Particular Justice into Corrective, Distributive, and Reciprocal according to the three mathematical ratios current in Greek thought.

Plato in his *Republic* conceived of a society fundamentally based on the division of labor and the consequent exchange of goods and services, although he never actually explained the nature of this exchange. His student Aristotle accepted this basic idea of division of labor, but went further to develop the nature of exchange necessitated by such a division of society. In the *Ethics*, Book V, he proposed a theory of Just Reciprocation in the exchange of goods. Because of division of labor there is no exchange among men of like profession. Physicians do not exchange with physicians but rather with farmers. Since the goods of exchange are unlike, there must be a certain equalization of value or justice of exchange in order for society to exist in a division of labor. Because of disproportionate amounts of value, a builder will not continue to build houses if he is compelled to exchange one house with a shoemaker for one pair of shoes. A fair exchange of value is fundamental to the continuation of society.

¹ Aristotle, *Ethics* V, 1131a.

² *Ibid.* V, 1131a-1132b.

³ *Ibid.* V, 1130a-1132b.

⁴ Cf. Soudek, *Proc. Amer. Philos. Soc.* 96: 52, 1952.

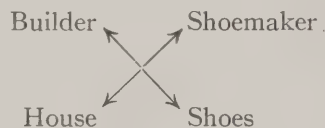
⁵ Aristotle, *Ethics* V, 1132b, p. 111.

⁶ Ritchie, D. G., Aristotle's subdivisions of "particular justice," *Class. Rev.* 8: 185-192, 1894.

⁷ Soudek, *Proc. Amer. Philos. Soc.* 96: 54-58, 1952.

Logically prior to the working of a just exchange is the determining of a common standard by which all things like and unlike may be measured. For Aristotle this factor which made all goods commensurable was ἡ χρεία, sometimes translated as "demand," but probably better rendered as "want" or "need." Actually, the factor of need plays a double role in economic exchange. It motivates exchange, because without mutual needs for each other's goods two parties will not trade, and it measures the value of different goods. The house of the builder has a greater value than the shoes of the shoemaker because it satisfies a greater need or want. To give a numerical character to the factor of need, the device of money was invented. Money is merely a human institution which measures the amount of want satisfaction in different goods and thereby makes them commensurable in exchange. For Aristotle the value of economic goods was based on the "subjective" factor of need or want. It was not until the rehabilitation of Aristotle by Albert the Great and Thomas Aquinas in the thirteenth century that the so-called "objective" factors of labor and expenses were added to the Aristotelian analysis.

If all goods can be measured in terms of need, how can they be exchanged according to equal value? How can the builder trade his house with the shoemaker for his shoes in a fair exchange of value? Aristotle envisaged the problem as analogous to the diagonals of a parallelogram where the four corners represent the two parties and their wares:



Such an exchange should be governed by the principle of Reciprocation in which a proportional equality operates on the basis of equal value or want satisfaction. The builder would receive a price equivalent to a large amount of shoes in exchange with the shoemaker. The mathematical mean underlying Aristotle's justice of Reciprocation was that of proportionality. A modern commentator has analyzed this mean to be the combination of the geometric mean and the arithmetic mean. Through bargaining the two parties in an exchange determine the relative position of want satisfactions of their goods, which involves the operation of the geometric mean or Distributive Justice. Once the relative positions are established, Corrective Justice with its arithmetic mean equalizes the loss and gains between the two values and determines the final price.⁸ By means of the principle of Reciprocation Aristotle thus attempted to analyze the workings of justice in economic exchange.

Aristotle's schematic analysis of economic justice has produced a considerable amount of confusion among

his subsequent commentators. In terms of everyday economic experience, however, his justice of exchange was probably nothing more mysterious than the normal competitive price. He does not state this conclusion in so many words, but it is the most obvious deduction from his analysis. Whatever his true opinion, which was never explicit, the thinkers of the Middle Ages did relate his theory of justice in economic exchange to the current market price.⁹

II. THE CHURCH FATHERS—MISGIVINGS ABOUT THE MERCHANT

Characteristically during the Middle Ages economic theories were discussed against a background of general suspicion towards merchants and mercantile activity. To a large extent this attitude was transmitted to the Middle Ages through the revered writings of the ancient Church Fathers. These misgivings about commerce and business, however, were not unique to the Patristic writers. The civilization of the Graeco-Roman world seems to have shared a similar opinion about the matter. A mere cursory sampling of the obviously prominent spokesman of Greek and Roman philosophy produces a consensus of mistrust of the merchant. Plato in the fourth century B.C. decried the characteristic temptation towards exorbitant profits in commercial transactions. Although he conceded the useful and laudatory function of the merchant as a distributor of goods, nevertheless, he was pessimistic about the possibility of many men maintaining a moderate course in trade. Exposure to the opportunities of amassing wealth seduced most men to the temptations of extreme profits. Plato's solution was to curtail merchandising to the smallest possible scope, even to forbidding its practice to resident citizens of a city.¹⁰

Aristotle had similar ambivalent feelings about the merchant. In Book One of his *Politics* he attempted to analyze human society from an economic point of view. In this discussion he distinguished between the art of acquisition by which economic goods were obtained and household management by which these goods were consumed. The art of acquisition was further divided into direct forms, such as hunting, fishing, and farming, and indirect forms in which goods were acquired by exchange and presumably included certain kinds of commercial activities. The art of acquisition was always regulated by normal necessities and was considered the natural means of supplying human needs. A merchant who regulated his profits by his needs was engaged in natural and legitimate acquisition.¹¹ Closely related to the art of indirect acquisition, however, was another category which might be called "business." This activity was unnatural because its purpose was not to supply needs but to amass riches. In a discus-

⁹ Cf. Schumpeter, *History of economic analysis*, 61, 62.

¹⁰ Plato, *Laws* XI, 918, 919.

¹¹ Aristotle, *Politics* I, 1256a and b.

⁸ *Ibid.* 63, 64.

sion foreshadowing later medieval views Aristotle maintained that this "business" for the sake of wealth had no limits and was an *appetitus divitiarum infinitus*, as it was later formulated.¹² Such excess contradicted Aristotle's basic ethical principle of moderation, and "business" was condemned as immoral and unnatural. Although Aristotle presented a basis for the justification of the merchant as a natural agent for supplying human needs, nonetheless he highly suspected the merchant's ability to withstand the temptations of greed. Since the merchant tended towards intemperance, which was destructive of virtue, he was disqualified from the privilege of citizenship in the best-governed state.¹³ In a manner characteristic of the Ancient world, Cicero in the first century B.C., although granting a certain respectability to wholesale merchants and to those settled on landed estates, despised the small retailers because of their petty lies and frauds.¹⁴ According to the authoritative spokesmen of Graeco-Roman thought, the ordinary merchant was *persona non grata*.

The influence of these pagan pronouncements upon the Church Fathers of Christian Antiquity is somewhat difficult to ascertain. A certain group of the Fathers was strongly influenced by the principles of Platonism; others knew Cicero well; probably Aristotle had no direct influence. If the Christian writers did not adopt specific doctrines of the pagan philosophy, they did in all probability contract from them a vague attitude towards merchants and trade. Perhaps a general stagnation of the commercial life of the Roman Empire during the first centuries of the Christian era nourished the Antique distrust towards commerce. Whatever these oblique influences might have been, the direct and most explicit source for the Patristic ideas on all subjects was the Christian Scriptures, and especially the New Testament. The Fathers' first concern was to interpret and transmit the ideas of Christ and the Apostles to the pagan world about them. Thus their attitudes towards wealth, commerce, and the merchant were prompted primarily by the doctrines of the Scriptures.

Neither the Old nor the New Testament contained a systematic *exposé* concerning the subjects of material goods or mercantile activity. The Scriptures did contain, however, varied pronouncements dealing more or less with the problem, and certain of these passages captured the attention of the Church Fathers. A fundamental attitude towards the material goods of human life was expressed by Christ in a well-known passage from the Sermon on the Mount. Christians were commanded to subordinate desires for food and clothing to spiritual purposes. If Christians would be faithful in seeking first the Kingdom of God and His righteousness, God would be faithful in supplying the material

needs of life.¹⁵ Not only did Christ teach the priority of spiritual aims over material goods, but He seemed also at times to have attacked an excessive accumulation of earthly goods. In the famous passage concerning the rich young ruler, which has been greatly disputed by commentators from the beginning of the Christian era, Christ commanded the wealthy young man to go sell his possessions and give the money to the poor in order to obtain treasure in heaven. In the discussion that followed this rigorous injunction Christ proclaimed one of the "hard sayings" of His ministry: "Again I tell you, it is easier for a camel to go through the eye of a needle than for a rich man to enter the Kingdom of God." When His disciples asked in amazement, "who then can be saved?" Christ concluded, "with men this is impossible, but with God all things are possible."¹⁶ Although the exact meaning of this passage may remain in doubt, the writer of the Epistle of James seems also to have echoed the protest against riches. In passionate language similar to the Old Testament prophets he hurled invectives against the rich who defrauded and oppressed the toiling poor.¹⁷

The Apostle Paul likewise reflected this theme of the corrupting influence of wealth. He warned that riches tempted Christians from spiritual values and coined the well-circulated phrase against cupidity or avarice: "The love of money is the root of all evil."¹⁸ Furthermore, Paul contributed another phrase which, when quoted somewhat out of context, was used to bolster the general ethical notion against dishonest or fraudulent dealings in business: "That no man go beyond and defraud his brother in any matter."¹⁹ This formula was to be later contrasted with the formula of Roman law permitting freedom of bargaining.²⁰

The outbursts against possession of great wealth, which occurred frequently in the writings of the Church Fathers, undoubtedly were prompted primarily by the New Testament teachings about wealth and especially by the account of the rich young ruler. At times these diatribes were cast in extreme terms giving no quarter to the possessors of riches. The Greek Father Basil the Great wrote a *Homilia in divites* in the fourth century which launched an impassioned attack against the rich with colorful descriptions of their fortunes and follies. To the corrupting influence of wealth he attributed the wars, piracies, murders and frauds of his day.²¹ In similar terms the Latin Father Jerome of the same century maintained the iniquitous origins of all wealth and approved of the common proverb: "The rich and the wicked are evil heirs."²² Often, however,

¹⁵ Matthew 6: 25-34.

¹⁶ Matthew 19: 16-26.

¹⁷ James 5: 1-6.

¹⁸ I Timothy 6: 10.

¹⁹ I Thessalonians 4: 6.

²⁰ See below, p. 57.

²¹ Basil, *Homilia in divites*, 7, P.G. 31: 298.

²² Jerome, *Hedibiae*, cap. 1, P.L. 22: 984.

¹² *Ibid.* I, 1257a and b.

¹³ *Ibid.* VII, 1328b.

¹⁴ Cicero, *De officiis* I, 42.

the condemnation was not unqualified. Jerome, himself, in commenting on the scriptural account of the rich young ruler claimed that although it was rare for the rich to enter the Kingdom of Heaven, it was not impossible if they unburdened themselves of their heavy sins.²³ Two centuries earlier the Greek writer Clement of Alexandria advocated a moderate interpretation of the Scriptural account. Christ's words condemning the rich, he maintained, must be understood in a fine and subtle and not a crude and literal sense. In fact, Clement's whole treatise on the subject, *Quis dives salvetur*, was an attempt to qualify universal and blanket condemnation of the rich. The difficulty of the wealthy to obtain salvation was not due to the single factor of their possessions, but rather to complex conditions involving spiritual values.²⁴ In another place Clement concluded that it was the wrong administration of riches that made them the source of vice and wickedness.²⁵

Even more worthy of mistrust than riches were the means of obtaining them by commercial practices. In holding this attitude the Fathers were merely agreeing with an opinion current in Classical pagan philosophy. At least three principal objections were advanced by the Fathers in their moral evaluation of trade, objections which were later to appear and reappear throughout the Middle Ages. Chief among these was that unquenchable greed or *cupiditas* was at the basis of mercantile activity. The most extreme statement of this position came from Tertullian of the third century A.D. Uncompromisingly mystical and apocalyptic in his approach, Tertullian despaired of almost every worldly idea or institution. The merchant he condemned in a tight little syllogism based on greed. "Is trading fit for the service of God?" he asked. "Certainly," was the reply, "if greed is absent, which is the cause of acquisition. But if acquisition ceases, there will be no longer the necessity of trading."²⁶ With Tertullian many of the Fathers remembered that greed was the root of all evil.

Another basis for misgivings was the conviction that essentially immoral means were too frequently necessary to perform trading activities. As the Classical philosophers, the Fathers were convinced that a merchant must lie, deceive, cheat, and commit all manner of fraud in order to sell his wares. For this reason commerce was morally risky business. Ambrose, Bishop of Milan, whose treatise *De officiis ministrorum* from the fourth century was concerned largely with current practical moral questions, pictured the merchant as one who labored day and night against the

principle of integrity.²⁷ Whenever money was in question the danger of fraud was often imminent as illustrated by the New Testament story of Ananias and Sapphira, who lied about the price of their land.²⁸ Apparently aware of the general remedies of Roman law against fraud, Ambrose went further to buttress their provisions with divine sanctions. Not only was fraud contrary to the formula of the lawyers, but it also opposed the decrees of the patriarchs of divine scripture.²⁹ Ambrose's illustrious contemporary Augustine shared this general mistrust in the power of merchants to refrain from sin. In a statement which was contradicted somewhat by a later opinion more favorable to the merchant's profession,³⁰ he maintained that, just as art cannot exist without imposture, neither can business exist without fraud.³¹ This general feeling was transmitted to the Canon law of the Middle Ages by two subsequent Patristic opinions, which will be considered later in fuller detail.³² In the sixth century Cassiodorus denounced traders "who burdened their wares with lies even more than with honest prices,"³³ and in the fifth century Pope Leo the Great summed up the general attitude with a phrase which became later well known: "it is difficult for buyers and sellers not to fall into sin."³⁴

A final and more specific point of contention of the Fathers against the agents of commerce concerned their control over the necessities of life. The merchant dealt not only in luxuries but also in food staples which affected so decisively the existence of the urban population. Especially could this control be felt in times of distress and famine, when merchants possessed monopoly powers over the market and could arbitrarily set the prices high. The Patristic writings vigorously attacked the trader's taking advantage of monopoly conditions to raise prices. Among the Greek Fathers Basil the Great condemned this type of profiteering,³⁵ and his friend Gregory of Nazianzus echoed him in a protest against those "who watched the difficult times in order to increase their wealth."³⁶ Their Latin contemporary Ambrose of Milan hurled an almost "Populist" protest against those who manipulated the agricultural markets. After praising the virtues and benefits of the labor of farmers, he violently denounced the merchant who "farmed the farmer" in order to amass great wealth.

²⁷ Ambrose, *De officiis ministrorum*, Lib. III, cap. 9, P.L. 16: 161, 162.

²⁸ *Ibid.*, Lib. III, cap. 11, P.L. 16: 166.

²⁹ *Ibid.*, Lib. III, cap. 10, P.L. 16: 164.

³⁰ See below, p. 15.

³¹ Augustine, *Ennaratio in Psalmum XXXIII*, 14, P.L. 36: 315.

³² See below, p. 37 and p. 39.

³³ Cassiodorus, *Expositio in Psalterium LXX*, 15, P.L. 70: 501.

³⁴ Leo the Great, *Epistola CLXVII*, P.L. 54: 1206. Jaffé and Wattenbach, *Regesta* 544, Anno 458-459.

³⁵ Basil, *Homilia in Lucam* 12: 18; 3, P.G. 31: 267.

³⁶ Gregory Nazianzus, *Oratio XLIII*, 34, P.G. 36: 543.

²³ Jerome, *Commentum ad Mattheum*, Lib. III, cap. 19, P.L. 26: 137, 138.

²⁴ Cf. Clement of Alexandria, *Liber Quis dives salvetur* II, P.G. 9: 606 and XVIII, P.G. 9: 622.

²⁵ Clement of Alexandria, *Paedagogus*, Lib. II, cap. 3, P.G. 8: 438.

²⁶ Tertullian, *De idolatria* XI, P.L. 1: 752.

"Why do you change the industry of nature into fraud?" he demanded. "Why do you diminish the abundance for the people? Why do you produce scarcities? . . . This you call industry; this you term diligence, which is the deceitfulness of craft, which is the cunningness of fraud. . . . This I call robbery and usury. . . . Your gain is the public's loss!"⁸⁷ In these three general types of criticism the Church Fathers were attacking not so much the amassing of riches as the accumulation of wealth by immoral means.

In large measure the thinkers of the Middle Ages inherited this uneasy conscience of the Church Fathers about riches and their acquisition through trade. The perils of wealth, the contagion of greed, the propensity towards fraud, and the oppression by monopoly became the major moral problems of the medieval theorists in their consideration of the subject of sale and price. Although the Patristic legacy of criticism was generally negative in attitude, it was not completely adverse. An exception may be found in certain scattered passages of Augustine. Of all the Church Fathers Augustine was probably the best known throughout the Middle Ages, and although it may be difficult to reconstruct from his writings a systematic theory of sale and the just price, nevertheless the Canonists and theologians of the Middle Ages drew out of his work certain elements from which they formulated their own theories.

One of the most important of these elements was a basis for the justification of the activities of the merchant. In a commentary to verse *Quoniam non cognovi negotiationes* (15) of Psalm LXX Augustine employed a more conciliatory approach. He quoted at some length a conversation, probably imaginary, between himself and a merchant in which he violently upbraided the merchant in general fashion for his lies, deceits, and scandalizing of the good name of Christianity. The merchant's reply to Augustine's accusations may be divided essentially into two parts: In the first place the merchant claimed that he earned his living by performing a beneficial service in transporting goods from long distances and selling them. According to the Christian principle that "a laborer is worthy of his hire" he deserved a certain amount of profit as compensation for his labor and sustenance for his living. In the second place, having justified his profits, the merchant went on to meet the moral objection to his profession. He made a clear distinction between the trader and his trade. If in commerce lies and perjuries arose, they were the fault of the trader and not of his trade. Such sins had their origin in the person, not the profession. Shoemakers and farmers, were they not capable of lies, perjuries and blasphemies, yet their professions could not be considered evil? The merchant concluded that if he lived righteously it would go well with him, but if he lived wickedly it would not be

due to his profession but to his own iniquity. In this conclusion Augustine agreed, and thereby cleared the profession of commerce from its fundamental stain of opprobrium.⁸⁸ In various condensations and paraphrasings this passage was quoted and requoted by the Canon lawyers and theologians throughout the twelfth and thirteenth centuries and played an important role in the medieval theories of the merchant and sale.

Another element extracted from the writings of Augustine and applied to economic problems by the later medieval thinkers concerned a theory of evaluating economic goods. As has been said, Aristotle had a "subjective" theory of value based on the criterion of human need. Although no direct connection can be shown to the theory of Aristotle, Augustine's solution to the problem was posed in similar terms. In the *De civitate dei* he outlined two systems of evaluating material goods. One was by a certain order of nature in which the living was preferred to the dead, the sensitive to the senseless, the reasonable to the irrational, and the immortal to the mortal. The other system of evaluation was on the basis of human use in which the natural order was often discarded. A man often paid more for a horse than for a male slave, and more for a ring than for a female slave, according to the demands of his own needs.⁸⁹ In this way Augustine suggested a system of value based on the satisfaction of human needs, which was extremely important to the scholastic analysis of value when Thomas Aquinas reexamined the problem.⁴⁰

A final passage from Augustine known to the writers of the Middle Ages was of less importance. In his doctrinal work *De trinitate* Augustine dealt with the subject of desires which are common to all men. To illustrate this problem he cited the example of a trick in which a theatrical actor announced to his audience that he would reveal what was in the mind of each of his listeners. The mysterious thought that was in each man's mind was the desire to buy cheap and to sell dear. Yet Augustine could think of some exceptions to the actor's ruse. Out of vicious extravagance one might wish to waste his patrimony by buying dear and selling cheap.⁴¹ There was also the case of a man who found a manuscript for sale at a ridiculously low price because of the seller's ignorance of the true value of the article. The buyer, however, out of a sense of honesty paid the just price for the manuscript which was considerably higher than the original price.⁴² Some modern commentators have cited this passage as evi-

⁸⁸ Augustine, *Ennarratio in Psalmum LXX*, 17, P.L. 36: 886, 887.

⁸⁹ Augustine, *De civitate dei*, Lib. XI, cap. 16, P.L. 41: 331.

⁴⁰ See below, p. 77.

⁴¹ Augustine, *De trinitate*, Lib. XIII, cap. 3, P.L. 42: 1017, 1018.

⁴² *Ibid.* 1018.

⁸⁷ Ambrose, *De officiis ministrorum*, Lib. III, cap. 6, P.L. 16: 157, 158.

dence of a doctrine of the just price in Augustine,⁴³ but this interpretation probably overemphasizes the importance of this single reference. Although the medieval writers did cite this example, in contrast they seemed to have emphasized the principal teaching of the common desire of all men to buy cheap and sell dear, which appears to be the fair interpretation of the Augustinian passage.⁴⁴

III. ANCIENT ROMAN LAW—A LEGAL SYSTEM OF SALE

By far the most substantial legacy of Antiquity to the medieval theories of the just price was in the realm of law. Most authorities agree that the greatest single contribution of Roman civilization to succeeding generations was its legal system. Roman law which culminated in Justinian's monumental *Corpus iuris civilis* of the sixth century formed the legal atmosphere essential to the medieval theories about the just price. At their very basis the ideas of the just price were theories of law, and the Roman law of sale was the fundamental framework in which these theories operated.

In twelfth-century Italy at Bologna interest was revived in Roman law by a renewed and intensified study of the *Corpus iuris civilis* of Justinian. The knowledge of ancient Roman law of the medieval jurist, therefore, was derived chiefly from the Code, Digest, Institutes, and Novellae, which constituted the divisions of the Justinian *corpus*. Actually the Justinian collection itself was a late compilation and interpretation of a legal system which had been evolving and changing for centuries. Much of the older legislation had even been changed or interpolated by the editing of Justinian. Of these earlier developments and later interpolations the scholars of the twelfth and thirteenth centuries were totally unaware. To them ancient Roman law was simply that which had been interpreted and presented to them by the compilers of the court of Justinian.

The most fundamental division of the law, according to the Roman lawyer Ulpian (d. A.D. 228) and followed by Justinian, was into public and private law. In general terms public law included relationships of principal concern to the state, such as constitutional and administrative law and also penal and religious law. Private law governed the affairs between private individuals. Contracts of sale and theories of price to a large extent remained within the domain of private law, although they were not completely excluded from the public law. The possibility was ever present of the state regulating commerce and supervising certain aspects of the contract of sale. As far as generalization is possible, however, the interference of public law with the operations of commerce during the late Re-

public and the early Empire was negligible. Trade operated in a world of free private economic activity and the state was content to play a mere "night-watchman for the business man."⁴⁵ Of course, many, perhaps important, exceptions may be found to this generalization. Regulation of commerce and price control were not new phenomena in the Ancient world. As far back as Plato's *Laws* discussion is found for price-fixing after consultation with experts in the market,⁴⁶ and the Athenians were accustomed to the policing of their markets by the *agoranomoi*. In the Roman Republic since Gaius Gracchus grain was publicly distributed to the people at half the market price, and Augustus appointed a *praefectus annonae* to control its distribution, thus affecting the market price. The administration of Egypt during the Empire stood as an example of controlled economy. Tacitus (d. A.D. 120) reported the fixing of the price of grain under Tiberius and Nero,⁴⁷ and Ulpian referred to policing of profiteers who made monopoly profits in famine years by the provincial proconsuls.⁴⁸ Furthermore, Ulpian reported that the sale of meat was regulated at Rome by the Prefect of the city even to the extent of determining the just price. Although the reference to the just price was probably an interpolation reflecting the conditions of the era of Justinian, the original statement still reflected a certain amount of price control.⁴⁹

The exceptions to the policy of economic *laissez faire* of the early Empire became the general rule in the late Empire. In the throes of a series of crises originating from within and without, the late Roman Empire transformed itself into a regimented society in which most phases of life were regulated by state control. This regimentation in commercial affairs was best illustrated by Diocletian's Edict of Maximum Prices in A.D. 301. Enforced by the penalty of death, the edict proposed to set the prices for all commodities and services throughout the Empire. Its purpose, as expressed in the preface, was to prevent immoderate prices and boundless desires for gain,⁵⁰ although modern scholars have assigned to it the less lofty purpose of maintaining the minimum rate of exchange of a rapidly sinking currency.⁵¹ Whatever its true purpose, the Edict was a failure, and Constantine later withdrew it. This legislation of Diocletian merely typifies the great mass of economic regulation in the late Empire and in the era of Justinian in which the *Corpus iuris civilis* was com-

⁴⁵ Cf. Walbank, Frank W., in *Cambridge economic history*, 2: 33 and 49.

⁴⁶ Plato, *Laws* XI, 920.

⁴⁷ Tacitus, *Annales* II, 87 and XV, 39. Cf. Jolowicz, *Jurid. Rev.* 49: 63, 1937.

⁴⁸ Ulpian, D. 47, 11, 6, pr.

⁴⁹ Ulpian, D. 1, 12, 1, par. 11. Cf. Genzmer, *Z. ausländ. int. Privatrecht* 11: 34, 1937.

⁵⁰ *Edictum Diocletiani*, 8, 9.

⁵¹ Genzmer, *Z. ausländ. int. Privatrecht* 11: 49, 1937, and Walbank, in *Cambridge economic history* 2: 57, 58.

⁴³ E.g. Kaulla, *Z. f. d. ges. Staatswiss.* 60: 581, 1904. Garnier, *L'idée du juste prix*, 39. O'Brian, *Essay*, 105. Ashley, *English economic history* 1: 133.

⁴⁴ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, ad 2. See below, p. 72.

piled.⁵² The context of a controlled economy influenced naturally enough the terminology of the compilers of the Justinian collections. The term *justum pretium* or its various equivalents were expressions characteristic of this regulated regime, and the preponderance of occurrences of these terms has its origin in the economic conditions of the late Empire. These circumstances are part of the conditions under which the term "just price" arrived to the attention of the medieval jurist.

Despite the oblique influences of public law, the activities of sale were primarily problems of private law. Although the public law policies of economic regulation of the late Empire undoubtedly influenced the Justinian compilation, the predominant commercial environment of the late Republic and the early Empire was that of economic *laissez faire*. Also concurrent with the late Republic and early Empire was the era of Roman law known as the Classical Age of jurisprudence, which was best represented in the Digest. In the realm of private law, therefore, the Digest reflected the general economic conditions of free enterprise. Two statements of Classical jurists found in the Digest were of supreme importance in stating the Roman private law principle of sale and of price. In the third century Ulpian quoting from Pomponius (fl. ca. A.D. 130) stated the principle in these terms:

Pomponius says that it is naturally permitted to parties to circumvent each other in the price of buying and selling.⁵³

In another text Paul (fl. ca. A.D. 225) expanded the terminology of Pomponius:

In buying and selling natural law permits the one party to buy for less and the other to sell for more than the thing is worth; thus each party is allowed to outwit the other.⁵⁴

In a word, these two statements laid down the general principle of freedom of bargaining. Buyers and sellers were permitted to outwit each other in the bargaining process—the one offering lower and the other demanding higher prices until they could agree upon a final price. This agreed price, as an expression of the wills of the contracting parties, was the legitimate price validated by law. From the very beginning of Roman law the sovereignty of the wills of buyer and seller appeared to have been the fundamental principle of arriving at prices. In the earliest forms of sale such as the *mancipatio* of the Law of the Twelve Tables in the fifth century B.C. the price agreed upon outside the ceremony of conveyance was implicitly valid without any further consideration of the true value of the goods.⁵⁵ Inadequacy of prices was no legal excuse for

rescinding a sale. The Theodosian Code contained several imperial rescripts from the late Empire of the fourth century which refused to annul contracts of sale because of the lowness of the price.⁵⁶ Although the right of imposing any price one can realize in a bargain probably grew out of the era of *laissez faire* during the Republic and early Empire, it was not necessarily inconsistent with the regime of regulated prices in the late Empire. Originating from Classical law and extending up through the compilation of Justinian, the fundamental Roman law principle of sale and price was that of freedom of bargaining. Its importance as a source of medieval theories of sale and price cannot be overestimated. Throughout the writings of medieval jurists echoed and reechoed the familiar formula: *licet contrahentibus invicem se naturaliter circumvenire* (or *circumscribere*).

The terminology of this principle of freedom of bargaining is superficially plain but, upon further consideration, appears less simple. Of minor importance is the word *naturaliter* which was hardly a Classical term and was probably inserted by Justinian to bolster the statements with Stoic philosophical terminology.⁵⁷ Of more importance are the two verbs *circumvenire* and *circumscribere*, which on the surface of their normal meaning appear to permit bargaining parties to cheat, defraud, or to deceive each other.⁵⁸ On the other hand, all actions of Roman law, unless otherwise indicated,⁵⁹ operated under the general assumption of good faith or *bona fides*. During the period of Classical Roman law sale belonged specifically to the class of *bonae fidei iudicia*.⁶⁰ This framework of good faith as, for example, expressed by Cicero required that "whatever was given or done must be done in good faith."⁶¹ Almost directly contrary to the simple meaning of the texts permitting deception and circumvention were other texts of Pomponius influenced by Stoic philosophy which interpreted good faith as the refraining from injury of others.⁶² The term *circumvenire* also contradicted directly the Christian principle of the Apostle Paul, which has been considered earlier.⁶³ In any event, the framework of good faith definitely precluded all forms of *dolus* or fraud. In a well-known statement of Labeo (d. ca. A.D. 15) of the early Empire, *dolus* was defined as "any cunning, deceit, or contrivance used to defraud, deceive or cheat another."⁶⁴ In terms of this definition it would appear that freedom of

⁵⁶ C.Th. 3, 1, 1; 4; and 7.

⁵⁷ Dekkers, *La lésion énorme*, 19, n. 3.

⁵⁸ Berger, *Dictionary*, v° *circumscribere*, defines the term as "to defraud the partner in a transaction."

⁵⁹ As for example actions of *iūs strictum*.

⁶⁰ Schulz, *Classical Roman law*, 35, 36.

⁶¹ Cicero, *De officiis* III, 16.

⁶² Pomponius, D. 23, 3, 6, par. 2. Pomponius, D. 50, 17, 206, and Pomponius D. 12, 6, 14.

⁶³ See above, p. 13.

⁶⁴ Ulpian, D. 4, 3, 1, par. 2. Cf. Berger, *Dictionary*, v° *dolus*.

⁵² E.g. the universal Novella 122 of Justinian in 544 forbade the rise of prices over the *vetus consuetudo*.

⁵³ Ulpian, D. 4, 4, 16, par. 4.

⁵⁴ Paul, D. 19, 2, 22, par. 3. English translation from Zulueta, *Roman law of sale*, 136.

⁵⁵ Kaulla, *Z. f. d. ges. Staatswiss.* 53: 389, 1902.

bargaining was a form of *dolus* and contrary to actions of good faith. It is most likely that this contradiction was in mind when one of the constitutions of the Theodosian Code refused to rescind a sale because of an inadequate price only when no deceit could be proved,⁶⁵ and when the Justinian compilers followed one of the principal texts permitting freedom of bargaining with another opinion stating "if no fraud of the opposing party can be proved."⁶⁶ Understood in its complete context, therefore, Roman law permitted a certain kind of *circumvenire* or *circumscribere* in bargaining as long as it was exclusive of *dolus*. How these two conflicting factors could be reconciled was a problem not solved in the texts of Justinian. This seductive and misleading terminology was inherited by the Middle Ages and was the occasion for an elaborate Medieval scheme involving the relationships between sale and fraud.

In a legal system as highly developed as Roman law some exceptions were likely to occur to the sweeping principle of the right to impose any price one can realize in a bargain. One exception which appeared at an early date and later increased in importance was the *Lex Laetoria* of 192 B.C. In this law a minor of less than twenty-five years, who was not necessarily defrauded, but merely mistaken in the price of a sale, could have restored the inequitable losses which he suffered. This restoration was performed by an extraordinary remedy of the Praetor known as *restitutio in integrum*.⁶⁷ In later Roman law the device of *restitutio in integrum* was extended to give extraordinary relief to anyone who could show unusual damage or disadvantage and who on equitable principles was entitled to such relief.

A more important exception to the broad Roman law principle of freedom of bargaining was a legal device in the Justinian Code known in later law as *laesio enormis*.⁶⁸ Two rescripts attributed to Diocletian and Maximianus, but obviously interpolated by the compilers of Justinian outlined the provisions of this legal device. The second and longer rescript actually contained a general summary of freedom of bargaining and merely appended the exception of *laesio enormis* to the conclusion,⁶⁹ but the first and shorter decree gave a succinct statement of the provisions of *laesio enormis*:

If your father sold the land at a price below its value, it is equitable that you either should repay the price to the buyers and recover the land with the assistance of the authority of the court, or should, if the buyer prefers, receive the amount of deficiency of a fair price. The price is

considered too low if less than half of the true price has been paid.⁷⁰

Reduced to its essential features, *laesio enormis* provided the possibility of remedying a contract of sale of land by the vendor if the contract price was less than one-half the just price. An option was given to the buyer to return the land and receive the original contract price or to supplement the contract price to the full value of the just price. In this manner a remedy was given to correct extreme inequities resulting from the general principle of free bargaining. Stated in broadest terms in relation to the sale of land, Roman law permitted buyers and sellers freedom to impose any price which could be agreed upon in a bargain provided that the agreed price was not lower than one-half the just value of the land. Freedom of bargaining was, therefore, partially limited by *laesio enormis*.

In the light of the later medieval developments certain features of *laesio enormis* should be emphasized. The Justinian formulation in the Code was not a general principle relating to all contracts of sale similar to the texts defining freedom of bargaining, but rather a specific piece of legislation remedying a specific situation. It applied only to an unusual disadvantage, that is, a loss below one-half the just price. If the price equalled or was above one-half the just price the remedy was not effective. It pertained only to the sale of land and protected only the seller. It did not apply to the sale of other articles or to the protection of the buyer. The choice of the means of remedy (rescission or the just price) rested solely with the buyer. Finally, to obtain its enforcement an appeal was made to the authority of the judge. *Laesio enormis* was a specific remedy for a specific ill; its extension as a broad principle of sale was a development of the Middle Ages.

Considerable interest among modern legal historians has been generated by the text of C. 4, 44, 2 which outlined *laesio enormis*. Grammatical difficulties within the passage itself showed unmistakable evidences of interpolation and raised strong doubts as to its origins during the reign of Diocletian. The terminology showed certain inconsistencies. The *pretium* was termed *iustum* in one case and *verum* in another. The general term *rem* contrasted with the more specific *fundum*, the singular *emptor* with the plural *emptoribus*, and the subjunctive *recipias* with the future *recipies*.⁷¹ The phrase *auctoritate iudicis intercedente*, which caused so much trouble for later medieval commentators,

⁶⁵ C.Th. 3, 1, 1.

⁶⁶ Hermogenianus, D. 19, 2, 23.

⁶⁷ Ossipow, *De la lésion*, 24.

⁶⁸ The term *laesio enormis* seems to have been used for the first time by the Post-glossator Cinus (1270-1333). Dekkers, *La lésion énorme*, 46.

⁶⁹ C. 4, 44, 8.

⁷⁰ C. 4, 44. *De rescindenda venditione* L. 2. *Impp. Diocletianus et Maximianus AA. Aurelio Lupo*. *Rem maioris pretii si tu vel pater tuus minoris pretii distraxit, humanum est, ut vel pretium te restituente emptoribus fundum venditum recipias auctoritate intercedente iudicis, vel, si emptor elegerit, quod deest iusto pretio recipies. minus autem pretium esse videtur, si nec dimidia pars veri pretii soluta sit. P.P. v.k. Nov. Diocletiano A. II et Aristobulo cons.* English translation in Zulueta, *Roman law of sale*, 165.

⁷¹ Dekkers, *La lésion énorme*, 16-19.

had no meaning in the period of Diocletian. Classical law knew the *arbitrum* or *officium* of the judge, but not the *auctoritas*.⁷² Moreover, the conception of *laesio enormis* did not fit into the general legal scheme of the period of Diocletian. In decrees that appear more authentic, Diocletian specified that fraud was a question of fact and not of the quantity of the price and that bad faith cannot be proved by an insufficient price.⁷³ Similarly three later constitutions of the Theodosian Code, which have been discussed earlier, contradicted the principle of *laesio enormis*.⁷⁴ Modern scholarship is generally agreed that the provisions of *laesio enormis* were interpolated into the text by the compilers of Justinian. Apparently they rewrote an earlier text of Diocletian, thus producing the present text.⁷⁵ What the original Diocletian text was and what were the additions of Justinian have been the subject of various reconstructions by modern scholars,⁷⁶ but all agree that the essential features of *laesio enormis* were the creation of Justinian. Because of the interpolations, the Latin text of the law was somewhat garbled and troubled with difficulties. It passed into the Greek translation of the *Basilica*, which was a tenth-century Byzantine rewriting of Justinian law, and *laesio enormis* was restated in clearer terminology.⁷⁷

Although modern scholarship has generally agreed to the Justinian authorship of *laesio enormis*, certain scholars have examined the problem in an attempt to find even further sources. With the abandoning of the Diocletian authorship has come the dismissal of the first theories which saw *laesio enormis* as a part of the economic regimentation of the Diocletian regime. Because of the close similarities between *laesio enormis* and the legal device of *onaah* in the Talmudic *Mishnah*, one theory has claimed popular Eastern and Jewish influences upon the origin of the Justinian remedy.⁷⁸ Another theory interpreted its origin not from economic but from moral sources motivated by the Christian teachings of the Church Fathers.⁷⁹ Similarly a further theory assumed the existence of an autonomous private

law system of the Church before the time of Constantine, which acted against avarice and un-Christian conduct. The device of the compilers was a middle way between the Roman law principle of fidelity to contracts and Stoic-Christian economic morals. In this perspective *laesio enormis* was viewed as a fifty per cent compromise between the Roman law freedom of bargaining and an assumed Christian theory of a full just price.⁸⁰ To date whatever theories have been devised for explaining the origins of *laesio enormis*, all of them have been only suggestions and none have arrived at definitive conclusions.

Also fundamental to the medieval theories of sale was the Roman law definition of price. The Institutes of Justinian gives the most succinct summary of what a Roman lawyer understood concerning the nature of price. A contract of sale came into existence the moment a definite price was agreed upon.⁸¹ In harmony with the general conception of the sovereignty of the wills of buyer and seller in free bargaining was the principle that mutual consent to a price was the sign and seal that a sale had been performed. As an outward expression of consent the price was the most important factor of the contract, and without a price there was no sale.⁸² This price must be in money that can be counted.⁸³ The employment of money in exchange for goods was the fundamental factor which characterized and distinguished it from barter (*permutatio*). The price must be certain or fixed.⁸⁴ An agreement for a sale "at a fair price" was not valid. The price must be definite, and if not expressed in a monetary figure, at least defined by reference to a definite fact or circumstance. A price also may be considered as fixed if left to the discretion of a third party.⁸⁵ Finally, the price of an object must be true, that is to say, a genuine or real offer. It could not be of a derisory nature—for example, the smallest unit of money (*nummus unus*). The principle of the true price was never meant to imply in Roman law that the price must be adequate, but merely that it must be genuine. Modern debate has resulted on the term *verum pretium* in the Justinian texts,⁸⁶ and although it may be true that the term is most often equivalent for *iustum pretium*, nonetheless, the genuineness of the price was still a valid doctrine of Roman law.⁸⁷

Although in a general way Roman law found little necessity for the price to be just, yet for special purposes it had need of the just price or true value. As has been noted, from early Republican times in the *restitutio in integrum* for the protection of a minor, the Praeter was

⁷² *Ibid.* 25.

⁷³ C. 4, 44, 4 and 10. Cf. Dekkers, *La lésion énorme*, 19, 20, and Genzmer, *Z. ausländ. int. Privatrecht* 11: 59, 1937.

⁷⁴ C.Th. 3, 1, 1; 4; and 7. See above, p. 17.

⁷⁵ Meynial, *Mélanges P.F. Girard* 2: 22, thought that Justinian had altered a text of Gratian, Valentinian, and Theodosius. The great majority of modern scholarship supports the view that the text was originally Diocletian's according to Justinian's own statement in the *Constitutio Deo auctore* that he never altered the names of authors of laws.

⁷⁶ Reconstructions of the original law of Diocletian have been offered by the following: Dekkers, *La lésion énorme*, 26; Scheuer, *Z. f. vergleich. Rechtswiss.* 47: 102, 1933; Solazzi, *B. Istit. Dir. rom.* 31: 77, 1921.

⁷⁷ *Basilica* XIX, 10, 36. A Latin translation may be found in Ossipow, *De la lésion*, 33. Cf. Brassloff, *Z. f. vergleich. Rechtswiss.* 27: 266, 1912, and Dekkers, *La lésion énorme*, 37, 38.

⁷⁸ Jolowicz, *Jurid. Rev.* 49: 53-58, 63-72, 1937.

⁷⁹ Dekkers, *La lésion énorme*, 27.

⁸⁰ Genzmer, *Z. ausländ. int. Privatrecht.* 11: 63, 64, 1937.

⁸¹ Inst. 3, 23, pr.

⁸² *Ibid.* 3, 23, par. 1.

⁸³ *Ibid.* 3, 23, par. 2.

⁸⁴ *Ibid.* 3, 23, par. 1.

⁸⁵ *Ibid.* Cf. also C. 4, 38, 15.

⁸⁶ Cf. Senarclens, in *Mélanges Paul Fournier*, 688-695.

⁸⁷ Ulpian, D. 41, 2, 10, par. 2.

required to make an estimate of true value of goods sold in order to restore to the injured minor. Similarly in an aedilician Edict requiring the seller to make known any defects in the goods, a complaint arising from this Edict necessitated a judicial estimation of the just price.⁸⁸ The device of *laesio enormis* which partially set the boundaries of free bargaining demanded the ascertaining of the just price. Apart from these examples in private law, the whole domain of public economic regulation of the late Empire often required the determination of the true value of goods. Hence the whole *Corpus* of Justinian is sprinkled liberally with references to the *iustum pretium*. When it was discovered from earlier documentary evidences that some of the terms were unmistakably added by the Justinian compilers,⁸⁹ certain scholars assumed that all of the expressions were interpolations.⁹⁰ Later, however, certain of the citations of just prices were found to be of Classical origin,⁹¹ and the most recent theories have stated that, although Justinian probably interpolated the majority of the references, the term was not unknown in the pre-Justinian period.⁹² In both the genuinely Classical and the Justinian interpolated texts, the term *iustum pretium* occurs under a great variety of circumstances. It is used as a legal device in cases involving the manumission of slaves, the restitution of stolen articles, the division of goods held in common, the settlement of marriage contracts and dowries, and various other situations. In most of these cases the meaning of the just price is a normal and customary price, which can be determined in commerce of free exchange which is regular and orderly. It is contrasted with an over-charged or a trifling price or a price based on the prejudiced affections of one of the parties. In all cases the just price seldom appears as a general transcendental standard of value but rather as an individual estimation for each case based on the market conditions of the time and place.⁹³

In the light of medieval developments, one further question is pertinent to the ancient Roman law conception of the just price. How was the just price itself determined? How was the true value of goods ascertained? Because of the secondary role of the just price in the ancient Roman law framework of sale, the answers to this crucial problem are neither easily found

nor decisively clear. Part of the difficulty was caused by a certain confusion of terminology. In the Justinian texts the distinction between price and value was never clear, and the word *pretium* was used for both conceptions without differentiation.⁹⁴ In general, the estimation of just prices and true values must be set within the framework of Roman law procedure, which was divided into two parts: *in iure* and *in iudicio*. The former was administered by the Praetor and concerned points of law and specifically legal procedure. The process of *in iudicio* was handled by the *iudex* or judge and concerned the finding of facts in each individual case in order to comply with the legal terms of the formula issued by the Praetor. As a fact-finding agent the judge was permitted wide discretionary powers, especially in *bona fides* actions. For example, in an elementary passage from the Institutes, the judge had the function of estimating damages and gains in litigation,⁹⁵ and, since these factors were often pecuniary, it is probably not too wild a guess to say that he was empowered to estimate a just price in litigation where needed. In fact, at least one reference says that he did that very thing.⁹⁶ Perhaps the judge also delegated the responsibility of estimating true values to an *arbitrium boni viri*, or judgment of a good man, which was a specific device of Roman law for discovering special points of information in certain cases. This judgment of a good man was the opinion of an honest, upright man to whom a controversial question had been submitted.⁹⁷ The use of the Roman law *iudex* and *arbitrium boni viri* for estimating just prices, was to be elaborated further during the Middle Ages.

On what criteria did the judge or the good man base his estimation of true value? What were the determining standards of the just price? Again, the answers to this problem are not easily found from the texts of Justinian, but in the light of later medieval developments certain ideas may be singled out. Basic to the determination of any price was the rule that all prices vary according to their individual circumstances. The price of oil, for example, was different in Rome and in Spain, and was different in Spain according to various seasons. All prices should, therefore, be estimated according to their particular place and time.⁹⁸ Obviously the Roman jurists were well acquainted with the factors which make prices fluctuate in time and space, and the medieval lawyers, finding nothing to add, accepted completely this basic premise. As to more specific criteria for estimating prices, one Justinian text suggested that the quality of the goods and the amount of rents should guide the evaluation.⁹⁹ These

⁸⁸ E. g. Ulpian, D. 21, 1, 1, par. 8. Ulpian, D. 21, 1, 14, par. 10. Cf. Kaulla, *Z. f. d. ges. Staatswiss.* 58: 409, 1902.

⁸⁹ When the Justinian text of C. 4, 46, 2 was compared with the Vatican Fragment 22, which was a pre-Justinian version of the same law, the term *iustum pretium* was found to be added. Cf. Scheuer, *Z. f. vergleich. Rechtswiss.* 47: 92, 93, 1933.

⁹⁰ Albertario, *B. Istit. Dir. rom.* 31: 1-19, 1921.

⁹¹ One of the first (Pomponius, D. 6, 1, 70) was discovered by Levy, *Z. d. Savigny-Stiftung f. Rechtsgesch.*, Roman Abt. 43: 535, 1922.

⁹² Cf. Senarclens, in *Mélanges Paul Fournier*, 701-704; Genzmer, *Z. ausländ. int. Privatrecht* 11: 39-47, 1937.

⁹³ For these conclusions, see *ibid.*, 46, 47.

⁹⁴ Oertmann, *Die Volkswirtschaftslehre*, 38-40.

⁹⁵ Inst. 4, 6, par. 30 and 31.

⁹⁶ Paul, D. 10, 3, 10, par. 2.

⁹⁷ Cf. Berger, *Dictionary*, v° *arbitrium boni viri*.

⁹⁸ Ulpian, D. 35, 2, 63, par. 2; Gaius, D. 13, 4, 3; and Ulpian, D. 34, 1, 14, par. 3.

⁹⁹ C. 4, 44, 16, par.

factors had later influence in the Middle Ages in the determination of land prices. Finally, ancient Roman law stated the important principle that prices of goods arise not from the whim or needs of single individuals but are observed commonly. In other words, price discrimination was not legal.¹⁰⁰ The Classical jurists did not specify exactly what they meant by commonly (*communiter*) but the medieval commentators were more explicit and equated it with the current price of goods. Although the ancient writers did not directly make this connection, the factor of the current price as a criterion for estimating the value of goods was not unknown to them. In several cases the current price was used as the standard of value for appraising goods,¹⁰¹ and foreshadowed the medieval method of setting prices. Such an enumeration of the criteria of ancient Roman law for judging the just price may lack explicitness. An explanation for this deficiency might be that the Roman jurists considered the problem of estimating just prices as a question of fact and hence of no professional interest. Proving of such points was left to the orators who pleaded *in iudicio*. When the problem is examined in the Middle Ages, however, the method of estimating the just price becomes increasingly clear.

2. THE MEDIEVAL ROMANISTS

(TWELFTH AND THIRTEENTH CENTURIES)

The great legal achievements of Rome culminated in the compilation of Justinian at Constantinople in the sixth century. Contemporary Roman civilization in the West, however, fell upon evil days during the anarchy of the barbarian invasions of the fourth and fifth centuries. The study and practice of Roman law in the West suffered an inevitable decline, and the great stream of Roman jurisprudence during the Empire dried up to a trickle at the beginning of the Middle Ages. As a consequence the development of the theories of price and sale of Roman law was suspended for almost six hundred years until the revival of Roman legal studies during the High Middle Ages.

At the end of the eleventh and the beginning of the twelfth centuries new interest was stimulated in the West for the study of Roman law. A school of jurisprudence sprang up at Bologna in Italy which dominated the development of Roman law throughout the twelfth and thirteenth centuries. The Glossators, as the medieval Romanists were called, restored to the West the *Corpus iuris civilis* of Justinian. The Digest was rediscovered, the Institutes and the Code were rehabilitated, and the whole text of Justinian was

studied in a purified version. The revival of Roman jurisprudence produced a corresponding development in the theories of sale and price. Towards the middle of the thirteenth century by the time of Accursius and Odofredus, the Glossators had achieved progress in the realm of the just price comparable to that of the scholastic theologians.

I. FREEDOM OF BARGAINING

The fundamental legacy of ancient Roman law to the problem of price determination was the broad principle of freedom of bargaining. The price to which two contracting parties could agree in a bargain was the legally sanctioned price. The Theodosian Code, as has been seen, decreed that a sale could not be rescinded because of an inadequate price, which was another way of phrasing the general principle.¹ This Theodosian statement of the problem was kept alive in the early Middle Ages in the *Breviarium Alarici* in the sixth century, in the collection of King Receswind of the seventh century, and in the Bavarian laws of the eighth century. It passed into Canon law in the False Capitularies of the ninth century and was faithfully reproduced by Ivo of Chartres in the beginning of the twelfth century.² After the rediscovery of the Digest at the turn of the eleventh and twelfth century, the phrase inspired by Classical Roman law, *licet contrahentibus invicem se naturaliter circumvenire*, was common throughout medieval Roman law literature.³ An abbreviation of the Code probably from the twelfth century stated that the activity of bargaining was the very substance of a contract of sale.⁴ In the thirteenth century both Accursius⁵ (d. 1263) and Odofredus⁶ (d. 1265) described the process of bargaining in which the seller started by offering a high price and the buyer a low price and after a certain amount of higgling they agreed upon a contract price. This agreed price was allowed to stand unless there was an unusual discrepancy between it and the true value. Exactly what the medieval Romanists understood by the process of

¹ See above, p. 17.

² *Breviarium Alaricianum*, 271; M.G.H., Zeumer, ed., *Lex Visigothorum edita ab Reccesvindo rege* V, 4, 7, p. 219, 220; M.G.H., von Schwind, ed., *Lex Baiuvariorum* XVI, 9, p. 437; False Capitularies, Collection of Benedictus Levita I, 362, P.L. 97: 749; and Ivo of Chartres, *Decretum* XVI, 285, P.L. 161: 956, 957. Cf. Dekkers, *La lésion énorme*, 42.

³ E.g. *Questiones dominorum Bononiensium* CXXXVIII, in Gaudenzi, *Bibliotheca* 1: 260; *Distinctiones*, Collectio Senensis XXVIII, in Gaudenzi, *Bibliotheca* 2: 152; and Pescatore, *Die Distinktionensammlung*, 8.

⁴ *Abbreviatio codicis* IV, 44, in Gaudenzi, *Bibliotheca* 1: 533.

⁵ Accursius, *Glossa ordinaria*, to C. 4, 44, 8.

⁶ Unde licet sis mulier, tamen scire debes quod voluntas emptoris est emere minus quam potest: et voluntas venditoris est vendere plus quam potest. unde venditor accrescit precium rei: et emptor decrescit et postea concordant. unde quia licitum est contrahentibus invicem se re ipse decipere, si lesio est moderata non rescinditur contractus. Odofredus, *Lectura*, to C. 4, 44, 8, fol. 247, col. 2.

¹⁰⁰ Pretia rerum non ex affectu nec utilitate singulorum, sed communiter funguntur. Ulpian, D. 35, 2, 63, pr. Cf. also Paul, D. 9, 2, 33, pr.

¹⁰¹ Ulpian, D. 36, 1, 1, par. 16; Paul, D. 14, 2, 2, par. 4; Ulpian, D. 47, 2, 52, par. 29; and C. 10, 27, 3, par. 1.

bargaining and how they related it to the realm of fraudulent actions will be examined later,⁷ but the fundamental factor determining prices in private law for the medieval Glossators as well as for the Classical lawyers was free bargaining.

II. LAESIO ENORMIS

The right of freedom of bargaining was a general principle in ancient Roman law and was known in some degree throughout the early Middle Ages. The device of *laesio enormis*, however, was an exceptional case pertaining only to sellers of land in the law of Justinian, and its provisions appear to have been neglected in the West during the intervening centuries between the codification of Justinian and the Bolognese revival.⁸ With the rehabilitation of the *Corpus iuris civilis* at the end of the eleventh century came the rediscovery of *laesio enormis* and the beginning of its medieval development which transformed its character radically. In as far as modern knowledge of the medieval sources permits, our first glimpse of the revived *laesio enormis* appears not in the treatises of the Bolognese Glossators, but at the outposts of Bologna's influence in France and England. The law manual *Brachylogus* of the first decade of the twelfth century in France succinctly summarized its provisions,⁹ and Vacarius (1149) several decades later in England indicated his awareness by writing a gloss to it and including it in another gloss to a law on actions of sale.¹⁰ In its revived form already one change had been made in interpretation. The specific *fundus* of the ambiguous Justinian text was suppressed in favor of the general *res*, and no longer did *laesio enormis* apply only to the sale of land, but to all goods which could be sold. On the other hand, the author of the *Brachylogus* and Vacarius, strongly influenced by the restored text of Justinian, visualized the device exclusively as a remedy for the seller. This point of view was followed by succeeding Glossators of the school of Bologna. The important *Summa Trecensis*, (ca. 1140–1159)¹¹ Rogerius, (d. 1170)¹² and Placentinus (d. 1191)¹³ interpreted *laesio enormis* as a remedy specifically for the

seller. Except for the resolution of the ambiguity between *fundus* and *res*, the early medieval Glossators revived *laesio enormis* substantially in the same terms as it was first proposed by the Justinian Code. A seller had the right to demand the remedy of a contract of sale if the price was less than one-half the just price, and the buyer had the choice either to rescind the sale by restoring the goods and receiving the original price, or to supply the just price.

The medieval Romanists underscored the essential feature of *laesio enormis* in emphasizing that it must be an unusual injury before legal remedy could be granted. One of the *Questiones* of the *Stemma Bulgaricum* (ca. 1170) considered an aspect of the problem which naturally would have arisen from any practical consideration of the subject: May a seller seek a remedy in a sale of land contracted at a price lower than the just price but higher than one-half of the just price? The buyer was completely free from suspect of fraud, and hence the dispute was entirely one of inadequacy of price. Bulgarus (fl. 1115–1165), who was named as giving the verdict in this question, decided that the seller had no remedy.¹⁴ Bulgarus' decision is significant because at no time afterwards, so far as is known, did a medieval Romanist dispute the problem. The remedy of a contract of sale was only granted to a party unusually injured beyond one-half the just price, and nothing short of this limit was considered sufficient to contest a sale.

Although several Romanists of the twelfth century, supported by the text of Justinian, limited the provisions of *laesio enormis* to the seller, at an early period within the same century certain others began to extend the remedies to the buyer. If we can trust the authority of the *Dissensiones* attributed to Hugolinus of the early thirteenth century, Martinus (ca. 1150), Albericus (ca. 1180), and surprisingly enough, even Placentinus considered its extension to protect the buyer.¹⁵ In more direct evidence of the twelfth century we find this new application in the Latin translation to the Provençal *Lo Codi* (ca. 1150)¹⁶ and in one of the *distinctiones* of the Hugo-Albericus collection (end of twelfth century)¹⁷. At the beginning of the thirteenth century Azo was the first of the principal Bolognese Glossators to include the question in a *summa codicis* (1208–1210), and by the *Glossa ordinaria* of Accursius and the *Lectura* of Odofredus, the extension of *laesio enormis* in behalf of the buyer was considered the normal meaning of the law.¹⁸ Accordingly the roles of buyer and seller of the Justinian *laesio enormis* were

⁷ See below, p. 30 ff.

⁸ Cf. Meynial, *Mélanges Girard* 2: 203–205.

⁹ *Brachylogus*, Lib. III, Tit. 13, p. 98, 99.

¹⁰ Vacarius, *Liber pauperum*, Lib. IV, Tit. 42 and 46, p. 147 and 153.

¹¹ *Summa Trecensis*, Lib. IV, Tit. 45, p. 116, 117.

¹² Rogerius, *Summa codicis*, to C. 4, 45 in Gaudenzi, *Bibliotheca* 1: 126.

¹³ *Iudicis officio venditio rescinditur, puta si venditor ultra dimidiam iusti pretii deceptus fuerit . . . deceptus inquam, non per emptoris dolositatem, sed re ipsa, rescinditur autem iniquitas ista electione emptori praebita, velitne iustum pretium supplere, et rem retinere; velitne rem restituere, et pretium iniustum a se praestitum recuperare . . . et contrario, id est, si emptor ultra dimidiam iusti pretii numeravit.* Placentinus, *Summa codicis*, to C. 4, 44, p. 176. Text compared with Paris Bibl. Nat. Lat. 4539, fol. 47^{rb} and 4441, fol. 48^{rb}.

¹⁴ *Questiones dominorum Bononiensium* LXIX, in Gaudenzi, *Bibliotheca* 1: 248.

¹⁵ See below, p. 23.

¹⁶ *Lo Codi*, 4, 61, 5, p. 127.

¹⁷ *Distinctiones*, Collectio Senensis XXVIII, in Gaudenzi, *Bibliotheca* 2: 152. Also found in Pescatore, *Die Distinktionsammlung*, 8, 9.

¹⁸ See below p. 23.

reversed. In a sale where the price was unusually high the buyer had a right to invoke the remedies of *laesio enormis*, but the seller, as Accursius pointed out, had the choice of either rescinding the sale or refunding the price to the amount of the fair value.¹⁹

The application of *laesio enormis* to protect the buyer was accepted by the medieval Romanists without any apparent debate. The computation, however, of the limits of injury to which the buyer was protected became a lively controversy among the Glossators. The difficulty arose from the text of Justinian which was designed originally with the seller in mind. Any price below one-half the just price (*dimidia iusti pretii*) made available the remedies of *laesio enormis* to the seller. For example, a thing which was valued at ten and which was sold at four or less could be rectified. But when the principle of *dimidia iusti pretii* was applied in behalf of the buyer two interpretations resulted. The earliest of the two interpretations stated that the limits of *laesio enormis* for the buyer should be set at double (*duplus*) the just price. This view was held as early as Martinus, Albericus, Placentinus (if we may trust the *Dissensiones* attributed to Hugolinus), the Latin version of the *Lo Codi*, and the Hugo-Albericus *Distinctiones*, but the arguments for this view were not revealed until the *Dissensiones dominorum* attributed to Hugolinus, in which the author presented the problem as one of the controversies alive among the Glossators of Bologna. In a *dissensio* entitled *Quando emtor enormiter laesus dicatur?* he presented the case for the "double" point of view.

The full force of the argument may be better appreciated if the word *duplus* is considered as a ratio of two-to-one rather than translated literally as "double." According to the argument, the law states that a sale may be rescinded if less than one-half the just price is supplied. In the case of a vendor who sells a thing which is worth ten, for less than five, the injury is in ratio of two-to-one or *in duplum*. This same ratio is employed analogously, but in reversed order, when applied to deception against the buyer. When a buyer buys a thing which is worth ten for more than twenty, his ratio of injury is one-to-two or *in duplum*, and the purchase may be rescinded. Therefore, to anticipate the contrary argument of Azo, a buyer who buys the same thing worth ten and pays sixteen cannot rescind the sale, because it does not conform to the ratio of one-to-two.²⁰ This interpretation, which also gained the approval of the author of the *dissensio*, emphasized the geometric proportion of two-to-one of *duplus* as the crucial criterion in computing the limits of *laesio enormis* for both the seller and the buyer.

At the beginning of the thirteenth century Azo opposed the first method of calculating the limits of

laesio enormis for the buyer and proposed a rival theory. His application of the principle of *dimidia iusti pretii* in behalf of the buyer suggested that the just price be used as the base for calculating the one-half and then this one-half be added to the just price to form the limit protecting the buyer. For example, when a purchaser bought a thing which was worth ten for sixteen, he could rescind the sale because the actual price was more than the just price exceeded to its half, which was fifteen. Azo rejected the previous theory of *duplus*, because the text of Justinian explicitly stated *dimidia* and not *duplus*, and defended his own theory of one-half the just price added to the just price as a more faithful interpretation of Justinian's principle.²¹ From a theoretical point of view, Azo upheld an arithmetic ratio in contrast to the geometric ratio of his opponents, but from a practical point of view, he presented a position more favorable to the buyer, as was pointed out by his followers. Although the author of the *Dissensiones* probably rejected Azo's interpretation, both Accursius²² and Odofredus²³ adopted his solution, rehearsed his objections, and added that the double theory permitted too much economic injury to the buyer. With the support of Accursius and Odofredus the final acceptance of the theory of Azo was assured among the medieval Romanists. In the opinion of the major Glossators of the thirteenth century, the buyer was not only permitted the remedies of *laesio enormis* along with the seller, but he also shared equivalent protection under them.

Concurrent with their efforts to extend the remedies of *laesio enormis* to the buyer, the Romanists worked on a minor problem which also affected particularly the buyer. Azo raised the question of goods perishing after the sale in the hands of the buyer but through no fault of his. If *laesio enormis* were invoked against the buyer because he bought the goods too cheaply, it might appear that the buyer was obligated to supply the just price, since the other alternative of returning the goods no longer remained. Azo quoted an opinion of Johannes Bassianus (d. 1197) to the contrary and maintained that the elimination of one of two legal alternatives did not force a party to perform the other.²⁴ Likewise

²¹ Azo, *Summa*, to C. 4, 44, p. 114. Cf. the similar passage in Azo, *Lectura*, C. 4, 44, 2, p. 341. Cf. the discussion of Meynial, *Studi Scialoja* 2: 342, 343.

²² Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2.

²³ Sed si vultis exemplificare in emptore decepto ultra dimidiam iusti precii exemplificabitis ita secundum Azo. Rem valentem .x. emptor emit pro .xvi. quia iste emptor deceptus est ultra dimidiam iusti precii, poterit agere ut res empta recipiatur. Alii autem volunt exemplificare in emptore decepto ultra dimidiam iusti precii, sic. Si rem valentem .x. emptor emit pro .xxi. sol. Quod non placet: quia in tali exemplo dicitur decipi emptor in duplum, non in dimidiam iusti precii. Ex quo colligetur istud not. quod nimis captio evitatur. Odofredus, *Lectura codicis*, to C. 4, 44, fol. 246, col. 2.

²⁴ Azo, *Lectura*, to C. 4, 44, 2, p. 341; and *Summa*, to C. 4, 44, p. 114.

¹⁹ Accursius, *Glossa ordinaria*, to *elegerit*: C. 4, 44, 2.

²⁰ Hugolinus, *Dissensiones dominorum*, par. 253, in Haenel, *Dissensiones dominorum*, 427.

Odofredus adopted the same solution as Johannes and Azo.²⁵

Two distinct phases comprise the legal process: What does the law say, and how is the law to be enforced? The Romanists of the twelfth and thirteenth centuries considered the sanctions for *laesio enormis* as well as developing its contents. In the procedural development of *laesio enormis* they concerned themselves with two additional questions: (1) By what legal action was *laesio enormis* to be enforced? and (2) How could the buyer force the seller to renounce the protections of *laesio enormis*? The second question was a special problem arising out of medieval practice, but the first was a general problem concerning the Roman law theories of actions. Discussion of the general legal enforcement of *laesio enormis* was occasioned by the phrase *auctoritate intercedente iudicis* in the original Justinian rescript. The terminology, which was unfamiliar to both ancient and medieval Roman law, was changed by the Glossators of the twelfth century to *officium iudicis*, which allotted large discretionary powers to the judge.²⁶ The *Summa Trecensis*,²⁷ Rogerius,²⁸ and Placentinus²⁹ generally distinguished between two kinds of fraud which vitiated contracts of sale: fraud which gave rise to contracts or causal fraud, and fraud which was incidental to contracts, which included the question of *laesio enormis*.³⁰ While causal fraud was remedied by an *actio doli*, incidental fraud, which included *laesio enormis*, was adjudicated by *officium iudicis*. Under this legal procedure the judge endowed with wide discretionary powers supervised the rescission of the sale or the reestablishment of the just price.

The enforcement of *laesio enormis* by an *officium iudicis* apparently implied the general provisions of *restitutio in integrum* to the Romanists of the twelfth century. In any case Johannes Bassianus and Azo interpreted *officium iudicis* as indicating the general procedure of *restitutio in integrum* which was valid

for only four years after the date of the contract of sale. A legal action of this kind implied that after four years had passed a party could no longer invoke the remedies of *laesio enormis* to rectify the sale. Johannes and Azo contested the enforcement by *restitutio in integrum* and argued that, since sale was generally a *bona fides* contract, *laesio enormis* should be enforced by an action *ex empto* or *ex contractu*, which had the advantage of lasting perpetually, that is, thirty years in Roman law. In this way both a buyer and seller would have much longer to detect a deception and remedy it through *laesio enormis*. While such enforcement would be made by an action *ex empto*, nevertheless, it would still maintain the wide discretionary aspects of the *officium iudicis*. *Laesio enormis* would be sanctioned by a legal action which combined the perpetual features of an *actio ex empto* and the wide discretionary features of *officium iudicis*.³¹ The innovation of Johannes and Azo incited debate. A *dissensio dominorum* rehearsed their arguments and opposed them with the opinion of Albericus who claimed that four years were preferable to thirty years in preventing interminable attempts to challenge the contract.³² The great authority of the *Glossa ordinaria* of Accursius³³ and the *Lectura* of Odofredus,³⁴ however, supported the position of Johannes and Azo and insured its final acceptance by the Romanists of the thirteenth century. They argued that agreements of sale were contracts of good faith and eligible for an *actio ex contractu* which lasted thirty years, and they emphasized the fact that the judge still preserved his wide discretionary powers. By the middle of the thirteenth century, therefore, the best features of the competing methods of enforcing *laesio enormis* had been combined, and a workable basis of legal enforcement was assured.

The second question which concerned the legal enforcement of *laesio enormis* was that of renunciation. The explicit renunciation of the remedies of *laesio enormis* by a seller in a written contract of sale was a device unknown to ancient Roman law. It originated from the everyday practice of medieval Roman law and it gained recognition from the Glossators and theorists

²⁵ Postea res illa sine culpa emptoris desiit esse in rerum natura. liberaturne emptor ut non teneatur reddere rem vel iustum precium. Ad quod quidam dixerunt, quod emptor tenebatur alternative ad duo: vel reddere rem, vel supplere iustum precium: unde si alterum periit, alterum est in obligatione. . . . Sed nos dicimus contra. et dicimus quod venditor non poterat agere: quia quis de casu fortuito non tenetur . . . unde satis est si venditor habet .iiii. et emptor liberatus est interitu rei . . . nec debet damnari ad iustum precium suppleendum. Odofredus, *Lectura*, to C. 4, 44, fol. 246, col. 3.

²⁶ Cf. Buckland, *Roman private law*, 383.

²⁷ *Summa Trecensis*, Lib. IV, Tit. 41, p. 116.

²⁸ Rogerius, *Summa codicis*, to C. 4, 45 in Gaudenzi, *Bibliotheca* 1: 126.

²⁹ Rescinditur venditio duobus modis, actione proposita, et iudicis officio. Actione proposita, ut quod met. cau. et de dolo: ubi dolus dedit causam contractui. . . . Iudicis officio venditio rescinditur, puta si venditor ultra dimidiam iusti pretii deceptus fuerit. Placentinus, *Summa codicis*, to C. 4, 44, p. 175, 176. Text compared with Paris Bibl. Nat. Lat. 4539, fol. 47^{vb} and 4441, fol. 48^{rb}.

³⁰ For a detailed discussion of the relationship between fraud and contracts of sale, see below, p. 30 ff.

³¹ Azo, *Lectura*, to C. 4, 44, 2, p. 341, and *Summa*, to C. 4, 44, p. 114.

³² Hugolinus, *Dissensiones dominorum*, par. 58, in Haenel, *Dissensiones dominorum*, p. 298, 299.

³³ Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2.

³⁴ Sed denuo quero, quo iure agitur, ut rescindatur contractus: vel iustum precium suppleatur. Dixerunt antiqui, officio iudicis: et petet venditor in integrum restitui. . . . Et erit ista restitutio petenda intra quadriennium tantum. . . . Sed certe nos dicimus contra. Et dicimus quod agit actione ex contractu. nam venditio et emptio est contractus bonae fidei et ideo in ea veniunt ea de quibus non est actum, vel cogitatum. . . . unde potest agi actione ex contractu: et iudex cognoscet. sic et alibi datur actio ad rescindendum contractum: et iudicis officium intervenit. et sic potest agi actione ex empto; cum sit personalis ad .xxx. annos. quia actio personalis durat ad .xxx. annos. . . . Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 3.

only at a later date. To trace its development we must begin with the actual charters of sale and manuals of notaries and then pass to the theoretical writings of the Glossators.

Towards the middle of the twelfth century in Lower Languedoc in France certain contracts of sale appeared in which the seller expressly renounced any subsequent use of the remedies of *laesio enormis* to rescind the sale. Contracts of sale containing this renunciation have been found for the years of 1155, 1158, and 1173 in Lower Languedoc.³⁵ Similar contracts appeared at the beginning of the thirteenth century in the adjacent territory of Provence.³⁶ The practice was also current in Italy where it won the sanction of the manuals for notaries. Its most usual formulation may be cited from a late Tuscan adaption of 1205 of a work of a Bolognese notary. The buyer was promised complete security of possession of a property even though the seller knew that the property was worth more than he had received for it. The seller also promised not to bring later action against the contract by reason of an insufficient price.³⁷ Echoes of this type of renunciation also have been found in Italy in the third and fourth decades of the thirteenth century in the well-known *Ars notariae* of Rainerius of Perugia.³⁸ Finally another series of charters shows that the practice reached northern France by the late thirteenth century.³⁹ At that time it was adopted by the famous *Coutumes de Beauvaisis* of Philippe de Beaumanoir (1246-1296).⁴⁰

Apparently this method of renouncing *laesio enormis* did not offer sufficient security to the buyer, because a new system of disavowing the remedies of *laesio enormis* for the seller replaced the simple renunciation. At the end of the twelfth century and in the south of France a legal device appeared in which the seller declared that whatever difference existed between the just price and the contract price he gave to the buyer as a donation. In this manner the buyer was protected against a future rescinding of the sale because of inadequate price. The evidence existing from the charters of sale shows this method to be more popular than the other.⁴¹ A great number of examples were included in the notaries' manuals in Italy. Its use is represented in the *Formularium* of Martinus of Fano written in 1232.⁴² It was cited several times, such as in a con-

tract of sale of a castle, in a notary's manual of Arezzo originating from the years 1240 to 1243.⁴³ The city of Belluno was also represented by a *Summa notariae* of the thirteenth century, which gave most explicit expression not only to the device of renunciation but also to that of donation. In a charter of sale the buyer of a house was protected from *laesio enormis* by both devices.⁴⁴

A third and final protection of the buyer against *laesio enormis* was the addition of an oath in which the seller swore not to take future action against the sale. Examples of its use are found both in the charter material⁴⁵ and in the notaries' manuals such as the *Summa notariae* of Belluno.⁴⁶ The notary of Belluno illustrates the three devices formulated during the twelfth and thirteenth centuries through contemporary practice of Roman law. By these means the buyer attempted to force the seller to annul any future use of the remedies of *laesio enormis*.

The Glossators were not long in responding to these devices of renouncing *laesio enormis* in current legal practice. The first type of renunciation which attracted their attention was the oath, and their first reaction was hostile. Placentinus contested the device of the oath and claimed that even when a seller promised with an oath not to contest a sale in the future, he could still seek the remedies of *laesio enormis* if injured beyond one-half the just price. His argument was that the seller in seeking the benefits of *laesio enormis* is not directly (*precise*) rescinding the sale or attempting to regain the article. He is merely asking for a supplement to obtain the just price. Strictly speaking, *laesio enormis* does not violate an oath not to contest a sale. If a rescission of the sale does result through *laesio enormis*, it is only because the buyer has refused to pay the just supplement.⁴⁷ Initiated by Azo⁴⁸ and followed by Accursius⁴⁹ and Odofredus,⁵⁰ the thir-

⁴³ *Summa notariae, Aretii composita* XIII, in Gaudenzi, *Bibliotheca* 3: 287. Other examples include pp. 283 and 285.

⁴⁴ *Summa notariae, Belluni composita* I, in Gaudenzi, *Bibliotheca* 3: 353. Other examples: V, IX, XL.

⁴⁵ Meynial, *Mélanges Girard* 2: 209, n. 5.

⁴⁶ *Summa notariae, Belluni composita* I, in Gaudenzi, *Bibliotheca* 3: 354.

⁴⁷ Dabitur autem praedicta rescindendi licencia, iudicio meo, etiam illi emptori qui iuraverit se contraversiam non moturum, se contra venditionem non venturum: quippe nec rem facit invenditam, nec precise, ut res retradatur petitur hoc ut vel precium suppleatur, vel res retradatur. Placentinus, *Summa codicis*, to C. 4, 44, p. 176. Text compared with Paris Bibl. Nat. Lat. 4539, fol. 47^{vb} and 4441, fol. 48^{rb}. (The word *emptori* found in the printed edition and the two manuscripts, is somewhat puzzling. Both Azo and the *Glossa ordinaria* relate Placentinus' ideas to the seller. Cf. Azo, *Summa*, to C. 4, 44, p. 114, and Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2. Also, Meynial, *Mélanges Girard* 2: 210, 211.)

⁴⁸ Azo, *Summa*, to C. 4, 44, p. 114.

⁴⁹ Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2.

⁵⁰ Sed nos in questione ista dicimus contra. et dicimus quod hoc casu non licet venditori venire contra istam venditionem. quia iuravit, nec principem, nec legem debet, sibi expectare

³⁵ Meynial, *Mélanges Girard* 2: 208, n. 1.

³⁶ *Ibid.* 2: 208, n. 3.

³⁷ *Wernerii formularium tabellionum*, Lib. I, I, 2 in Gaudenzi, *Bibliotheca* 1: 12; *ibid.*, Lib. I, II, 7, p. 14. This work was considered by its editors as a later adaptation of Irnerius, but Kantorowicz feels that it is a Tuscan adaptation of a Bolognese notary. Cf. Kantorowicz, *Studies in the Glossators*, 36.

³⁸ Rainerius Perusinus, *Ars notariae* X, in Wahrmund, *Quellen* 3 (2): 28.

³⁹ Meynial, *Mélanges Girard* 2: 209, n. 4.

⁴⁰ Philippe de Beaumanoir, *Coutumes de Beauvaisis* 2: 54.

⁴¹ Meynial, *Mélanges Girard* 2: 209, n. 3.

⁴² Martinus de Fano, *Formularium* LXXXII, in Wahrmund, *Quellen* 1 (8): 33.

teenth-century Romanists took issue with Placentinus' earlier hostility and upheld the current practice of renunciation of *laesio enormis* by oath. Their supporting arguments were based on the sanctity of oaths, without which sanctity political and legal authority would be impossible. Odofredus attached the somewhat sophistic arguments of Placentinus which revolved around the word "directly" (*precise*) by pointing out that although the seller is not rescinding the sale directly by asking for a supplement of the just price he is rescinding it indirectly. If the buyer cannot or does not want to pay the just price he is forced thereby to rescind the sale, an action against which the seller's original oath had protected the buyer.⁵¹

Beginning with Azo, the thirteenth-century Glossators also accepted the practical device of renunciation of *laesio enormis* by donation. Azo gave brief mention to the device by stating that donation obviously eliminates any claim of a mistake in the price, a claim which was necessary to invoke *laesio enormis*. No one can pretend that he has made a mistake in the price when he has knowingly and explicitly given the amount of his mistake to the other party.⁵² In Odofredus' discussion a further distinction was made between corporal and incorporeal goods. Certain corporal goods, being divisible, may be partly sold and partly donated. Since both the contracts of sale and donation are valid, renunciation of *laesio enormis* by this means is legal. Incorporeal goods, however, cannot be divided, and the mixture of sale and donation of the same thing would not be valid.⁵³

By three legal devices the current practice of medieval Roman law created the means for denying the benefits of *laesio enormis* to the seller. Strongly influenced by the prevalence and popularity of these renunciations, the Glossators overcame their initial hostility and ac-

authorem periurii. . . . Item, quia per leges que periuria puniunt, non debet via periuriis aperiri. . . . Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 2.

⁵¹ Sed diceret aliquis vestrum, si venditor agit actione ex contractu ex vendito ut rescindatur venditio, vel ut suppleatur iustum precium: num venit precise contra venditionem. Respondetur venit contra venditionem: et si non directo, tamen per medium, quia si nolit emptor supplere iustum precium, venditio rescindatur: unde quod est prohibitum generaliter, non debet concedi ad id pervenire per aliam viam. . . . *Ibid.*

⁵² Azo, *Summa*, to C. 4, 44, p. 114. For a discussion of the relationship between *laesio enormis* and knowledge, see below, p. 31.

⁵³ Sed denuo quero hic, rem valentem .x. aliquis vendidit tibi pro .iiii. et dixit, si res ista plus valet iusto precio, illud plus dono tibi pure et simpliciter nunquid hoc non obstante poterit venire contra ratione deceptionis dimidii iusti precii. Videtur quod non: quia pro ea parte pro qua precium est solutum vere, non poterit venire contra: nec pro ea parte quam pure donavit: et quis partem rei corporalis pro parte potest vendere: et pro parte potest donare. nisi inter virum et uxorem. . . . Secus tamen est in incorporalibus: quia vel tota actio debet vendi vel tota donari: non autem pro parte donari. imo talis contractus reprobatur. Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 2.

cepted them as legitimate legal practices. Denial of the remedies of *laesio enormis*, however, was actually a small part of a general medieval tendency to renounce a large variety of protections of Roman law. The *exceptio non numeratae pecuniae*, the *exceptio doli*, the *exceptio pretii non soluti*, the *beneficium iuris et facti ignorantiae*, and many others as well as *laesio enormis* were disavowed in numerous commercial contracts of the period. This curious medieval movement of forswearing many of the benefits of Roman law has aroused interest in modern scholarship, and attempts have been made to explain its occurrence. Some students have dismissed the practice as an inconsequential ruse of notaries to pad their charters with meaningless legal phrases in order to collect higher fees.⁵⁴ Other students have interpreted it as a means of the Germanic folk to fight against Roman law institutions in an underlying struggle between Germanic and Roman law.⁵⁵ Similarly it has been suggested that it represented an inability to apply the complicated features of Roman law to contemporary legal situations.⁵⁶ The most recent explanation has seen the tendency towards renunciations as a result of increased business activity which attempted to throw off legal restraints hindering contractual freedom.⁵⁷ Merchants did not like to have lawyers interfering with their contracts. Whatever the general significance of renunciations might have been, it is still important to note that the denial of *laesio enormis* in both the charters and the Glossators' discussions was a device directed exclusively against the seller. The counterpart of a renunciation by the buyer has not been found in the documents.

By the middle of the thirteenth century during the period of the *Glossa ordinaria* of Accursius and the *Lectura codicis* of Odofredus, the significance of the medieval transformation of *laesio enormis* may be evaluated in two areas. In a special sense its progress in the thirteenth century represents the buyer's attainment of legal equality with the seller. The original rescript of Justinian allowed the benefits of *laesio enormis* only to the seller, and several of the early Glossators of the twelfth century interpreted it primarily in these terms. The facts of ordinary commercial life, however, especially in a period of lively trading activity, place the buyer in a bargaining position equally disadvantageous to that of the seller. Whatever the pressures of these economic realities might have been, it is evident that, beginning with the Glossators of the twelfth century, the remedies of *laesio enormis* were made available to the buyer also. At first they were offered to the buyer at terms less advantageous than those to the seller, but with

⁵⁴ Giry, Arthur, *Manuel de diplomatique*, 560 ff., Paris, 1894, and Bouard, Alain de, *Manuel de diplomatique française et pontificale* 1: 285-290 Paris, 1929.

⁵⁵ Meynial, *Nouv. R. hist. Droit* 24: 103-142, 1900; 25: 241-277, 657-697, 1901; 26: 49-78, 649-710, 1902; 28: 699-746, 1904.

⁵⁶ Dekkers, *La lésion énorme*, 54-57.

⁵⁷ Riesenberg, in *Essays in honor of Evans*, 207-225.

the victory of Azo's theory of computations, the buyer received equal protection. The details of the theory were accommodated to the buyer's use. No longer was he compelled to pay the just price in litigation if the goods perished in his possession, and he was permitted the means of denying these remedies to the seller through renunciation. All of these factors added up to a legal revolution in the development of *laesio enormis*—a revolution which deposed the seller from his place of privilege and elevated the buyer to at least an equal position. This switch of interest from the seller to the buyer is well illustrated from a practical legal treatise. At the end of the twelfth century Pillius (d. 1198), a student of Placentinus, composed a *Libellus de preparatoriis litium*, which was a book of instructions for lawyers composing writs (*libelli*) in legal actions. Among these instructions are found two sections concerning actions arising out of contracts of selling and buying. It is significant to note that although the instructions for writs arising from sale were detailed and comprehensive, no guidance was given the seller about *laesio enormis*. On the other hand, the section for buyers concluded with careful instructions about the use of *laesio enormis*, and the method of calculating the limits of protection were those which were most favorable to the buyer.⁵⁸

The attainment of legal equality between the buyer and the seller was actually a special case in the general theory. When the original text of Justinian is compared with the product of the thirteenth-century Glossators, the revolutionary character of the medieval transformation may be ascertained. *Laesio enormis* began as a special and exceptional protection for injured sellers of land. During the Middle Ages its benefits were extended to the buyer, eventually on an equality of terms with the seller. The details and the legal enforcement of the whole doctrine were worked out to produce a practical theory of law. *Laesio enormis* ended as a broad generalized principle for both buyers and sellers of all kinds of goods in an effort to rectify gross economic injustice. In its transformation, it became commensurate and supplementary to the general Roman law theory of free bargaining. Gross mistakes of price in free marketing could be remedied by law. Although Accursius, Odofredus, and a *distinctio* of Hugo-Albericus conceded the principle of freedom of bargaining in a strict understanding of Roman law (*de rigore iuris*), yet they felt that a sense of justice or *equitas* permitted the remedy of unusual errors by *laesio enormis*.⁵⁹ In a sense, therefore, the Romanists

paralleled the efforts of the contemporary theologians by enforcing a kind of just price—not a complete just price, but at least a one-half just price.⁶⁰

III. THE ESTIMATION OF THE JUST PRICE

Although Roman law in the Middle Ages made no attempt to enforce a full just price in private contracts of sale, yet the just price was necessary as a special device to many legal procedures, of which *laesio enormis* was only one. In the Romanists' conception of buying and selling remained the important question: How was the just price itself to be determined? With a little imagination one can see that the settling of the exact value of the just price might have been the chief point of litigation concerning *laesio enormis*. Hence the problem of estimating the just price was of considerable importance.

The ascertaining of the just price in Roman law may be divided into two separate aspects: By what legal mechanism was it discovered and by what criteria was it assessed? As has been seen, the provisions of *laesio enormis* were enforced at first by an *officium iudicis* through *restitutio in integrum* and later by an *actio ex contractu* in which the *officium iudicis* also played an important part.⁶¹ According to our understanding of Roman law court procedure, the method of *officium iudicis* allowed wide discretionary powers to the judge and his court. Among these powers a general passage in the Institutes permitted to the judge the right of estimating monetary values in actions of good faith—a right which appears to have continued during the Middle Ages.⁶² When the judge did not feel competent to discover a certain matter of information he referred the matter to the judgment of a "good man" (*recurratur ad arbitrium boni viri*). As indicated from the countless citations of the formula during the Middle Ages, the *arbitrium boni viri* was widely used in rendering judgments in the practice of Roman law. When a case of *laesio enormis* was adjudicated in medieval Roman law, the fair value of goods was ascertained probably through the judicial process of *officium iudicis* in which the judge or the "good man" finally determined the just price.

As to the actual mechanism of estimating a just price by a judge or an *arbitrium boni viri*, the Glossators give little explanation. They cited the formulas frequently but assumed most likely that the process was too well known to merit specific elaboration. More-

2, fol. 246, col. 2. For the passage of Hugo-Albericus, see below, p. 30, n. 92.

⁵⁸ Pillius, *Libellus XXXIII*, in Gaudenzi, *Bibliotheca* 3: 50.
⁵⁹ Accursius, *Glossa ordinaria*, to *humanum est*: C. 4, 44, 2. Sed lesio est immoderata, licet rigor iuris non patitur rescindi hanc venditionem, quia licitum est unicuique ab initio contrahere vel non contrahere . . . et quia licitum est contrahentibus invicem se precio decipere: equitas tamen suadet, ut si deceptio est ultra dimidiam iusti precii, quod venditio rescindatur vel suppleatur iustum precium. Odofredus, *Lectura*, to C. 4, 44,

⁶⁰ The requirement of a full just price in the writings of the medieval Romanists was so unusual that its exceptional character is noticed immediately. An example may be found in *Summa notariae*, Aretii composita VII, in Gaudenzi, *Bibliotheca* 3: 283.

⁶¹ See above, p. 24.

⁶² For example, Bulgarus, *De diversis regulis*, Reg. XXIII, p. 25.

over, the *bonus vir* remains a somewhat elusive personage. In ancient Roman law he was an honest and upright man to whom a controversial point was submitted, but in the medieval acts and charters few details are divulged about his functions. During the Carolingian period he was an alderman (*échevin*) in some cases, but in the later period of the Middle Ages he was probably a notable and disinterested person who was competent to judge a specific matter.⁶³ The charters of sale yield some evidence of the estimating of values of goods by "good men,"⁶⁴ but our chief source for their activities comes from the Italian notaries of the thirteenth century. The notary of Belluno included in four of his sample contracts of sale a procedure of estimation by good men (*boni homines*), who assessed the change of value of houses included in the contracts.⁶⁵ In the *Formularium* of Martinus of Fano of 1232 the "good man" was called an *estimator* and was commissioned to assess the expenses of litigation and the value of goods seized in the payment of a debt. The procedure of estimation was made in secret and the results were later published to be contested if the defendant saw fit.⁶⁶ A similar kind of assessment was recorded by Magister Aegidius of Bologna who wrote around the middle of the century.⁶⁷

The closest evidence which we possess of an explicit estimation of a just price is found in the *Ars notariae*, written between 1224 and 1234 at Bologna by Rainerius of Perugia. This manual defined the duties of a group of *estimatores* which included such assessments as: the determination of obligations between debtors and creditors, the appraisal of landed properties and their boundaries, the division among partners of things held in common, and the adjudicating of the right of way. Among various sample cases calling for appraisal was a contract of sale, in which estimators were asked to give, among other things, a *iusta estimatio*.⁶⁸ The sample writ closed with a clause calling upon the defendant to contest the judgment of the estimators at their court before eight days. As illustrated in the example of Rainerius, the change from the singular "good man" and "estimator" to the plural "good men" and "estimators" probably indicates that the responsibility for assessing monetary value was too great for a single individual and at times was extended to a group of qualified men. The estimators were closely connected with the judge and the judicial procedure, and the assessment could be considered an *arbitrium boni*

viri as part of the *officium iudicis*. All of these facts suggest that the estimators of Bologna could have been called upon to assess the just price in a case of *laesio enormis*.

Although the general mechanism of determining a just price is fairly apparent, one question yet remains to be answered: On what criteria was the judge or estimators to base assessment? What were the standards which determined a just price? As a preliminary condition, the medieval Romanists generally recognized the Classical dictum that prices should be estimated according to the specific time and place of the sale. Placentinus⁶⁹ and Azo⁷⁰ included this condition in their discussions and Accursius repeated it throughout his gloss.⁷¹ Explicit discussion, however, of the more crucial criteria for estimating a just price appears not to have begun until the time of Azo at the beginning of the thirteenth century. The tardiness of this discussion is most likely due to the fact that the general solutions were taken for granted by preceding Romanists. Undoubtedly there was need for estimating just prices long before Azo, but not until the thirteenth century were the methods discussed explicitly. Accursius continued the discussion of Azo, and Odofredus summarized the conclusions of his time in a concise statement.

The *Lectura* of Odofredus listed four standards for estimating the fair value of economic goods. The first criterion was undoubtedly the most important and fundamental of all: The value of a thing is that price which it fetches commonly (*communiter*) in a sale.⁷² Odofredus was merely referring to the Classical formula widely current throughout the medieval Romanists that prices of goods arise not from the whim or needs of single individuals but are observed commonly.⁷³ Again, price discrimination was not legal. Although the term *communiter* was somewhat ambiguous in the Classical statement, it was defined more precisely in medieval usage. At times it was equated with an estimation made according to the truth in opposition to a price based on the desires of single individuals.⁷⁴ Most often, the term *communiter* referred expressly to the current price. Accursius, in a gloss to the Classical phrase, plainly stated that "a thing was valued at that for which it could be commonly sold."⁷⁵ This formula

⁶⁹ Placentinus, *Summa*, to C. 4, 44, p. 176.

⁷⁰ Azo, *Summa*, to C. 4, 44, p. 114.

⁷¹ Accursius, *Glossa ordinaria*, to *varia*: D. 13, 4, 3.

⁷² Sed quomodo probabit quod res illa tunc valebat .x. Respondeo hoc modo probabit, quia si communiter res illa posita fuisset venalis, habuisset .x. non autem dicit, ita habebam caram ratione affectionis. quia precia rerum et cetera. . . . Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 3.

⁷³ See above, p. 21.

⁷⁴ Accursius, *Glossa ordinaria*, to *Non est*: C. 4, 44, 6. Also to *ultra rei pretium*: D. 12, 3, 1; and to D. 35, 2, 42.

⁷⁵ Id est, communi pretio aestimantur res. quod ergo dicitur, res tantum valet quantum vendi potest, scilicet communiter: . . . *Ibid.*, to *funguntur*: D. 35, 2, 63, pr.

⁶³ Bongert, *Recherches sur les cours laïques du X^e au XIII^e siècle*, 110, 111.

⁶⁴ *Ibid.*, 111, n. 1.

⁶⁵ *Summa notaria*, Belluni composita I, in Gaudenzi, *Bibliotheca* 3: 353, 354. Similar clauses in Tits. VIII, XI, XIII.

⁶⁶ Martinus de Fano, *Formularium* XIX, in Wahrmund, *Quellen* 1 (8): 7.

⁶⁷ Magister Aegidius, *Summa* XXXVII, in Wahrmund, *Quellen* 1 (6): 12, 13.

⁶⁸ Rainerius Perusinus, *Ars notariae* CCXCIX, in Wahrmund, *Quellen* 3 (2): 156-158.

was repeated in numerous passages throughout the Gloss.⁷⁶ As the frequency of this phrase suggested and as Odofredus himself indicated, the most important and fundamental means of the medieval Romanists for determining the just price was the current price.

The three following standards of estimating fair prices of Odofredus pertained more or less to land and immovables. He stated that the values of surrounding lands should be compared in assessing the just price of a particular piece of land.⁷⁷ This criterion appears to have been first suggested by Azo. The fair price of one thing, Azo maintained somewhat obscurely, may be found by comparing it with the accepted prices of similar things. For example, if a man bought a piece of land which was no better than my land for a price which was more than double the price of my land, I could safely say that I was deceived beyond one-half the just price. If it were objected that this man had bought foolishly, or that his land was not adjacent, I would have to show that his land was adjacent and it is not plausible that he bought foolishly.⁷⁸ This basic method of comparing values, especially in land, Accursius accepted in a sentence of his Gloss.⁷⁹

Odofredus' third standard of appraising prices was more exclusively limited to land than the others. The value of land may be ascertained by comparing the amount of rent normally yielded with the revenues of other lands.⁸⁰ Again Azo seems to have been the first to introduce the device into the medieval discussions by borrowing the phrase *ex quantitate reddituum* directly from the rescript in the Code relating to public sale.⁸¹ Accursius expanded the phrase to *rei qualitatem et reddituum quantitatem* as it was in the original passage of the Code, and made a distinction between movables and immovables.⁸² Finally, Odofredus' fourth criterion suggested that one should take advice from the men of the locality who are presumed to know the value of their individual patrimonies and therefore able to have a reasonable standard of judgment. In passing it should be noted that the function of these men of the community resembles closely that of the "good men"

or estimators of the judicial procedure of Roman law. But, Odofredus hastened to add, this advice applies only to things of fixed nature, such as houses and land, and not to things of more variable nature.⁸³

Of the four criteria enumerated by Odofredus, it may be argued that the last three were merely special devices for determining the first. The comparison of the price of one thing with the established values of similar things, the assessment of value according to rents or revenue, and the advice of men of the locality may all be interpreted as different means for discovering the current price. In short, the just price was equated with the current price. In litigation concerning *laesio enormis*, therefore, when the judge or the "good men" attempted to ascertain the true value of goods, the actual going price at the time and place of the original sale was the object of their inquiry.

Translated into terms of medieval economic experience, the current or going price would include competitive prices, determined, in the terminology of modern Classical economists, by the concurrence of supplies of goods and demands of buyers. It would apply to movable goods which were sold usually on specific market places and also to immovables, such as land, which were not necessarily sold on a market place. The current price could also presumably include legal prices regulated by lawful authorities, such as guilds and town governments, on the grounds that the legal price was in fact the actual going price and that it was fixed by justly constituted authority. On the other hand, the current price would exclude private monopoly prices or those set by a sole seller. Medieval market regulations generally outlawed such practices as forestalling, or the private buying up of goods before they reached the market, engrossing, or buying up the whole or large supply of goods to corner the market, and regrating, or the buying of goods to be sold again on the same market. These private monopolistic practices would artificially force prices above the competitive level and would not be lawfully authorized. In medieval economic life, therefore, the current or going price could comprise both free competitive and officially regulated prices depending on the conditions of the actual market.⁸⁴

IV. THE PROBLEM OF PRICE AND FRAUD

If the general principle of price determination in medieval Roman law was freedom of bargaining within

⁷⁶ *Ibid.*, to *redempturus fuit*: D. 9, 2, 33; to *verum pretium*: D. 47, 2, 50, pr; to *invenerit*: D. 13, 1, 14; to *sine hac cautione*: D. 36, 1, 1, par. 16; to *emptorem*: D. 47, 2, 52, par. 29; to *non lucri*: D. 14, 2, 2, par. 4.

⁷⁷ Vel probabit quod alia predia circumiacentia valebant .x. et ita erat istud predium bonum ut convicium. . . . Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 3.

⁷⁸ Azo, *Lectura*, to C. 4, 44, 8, p. 342. In all of the available editions Azo seems to say that the comparable land should not be adjacent. Both Accursius and Odofredus, however, interpret his statement to mean adjacent lands, which makes better sense.

⁷⁹ Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2.

⁸⁰ Vel probabit quod tot fructus consueverunt percipi ex illa re sicut ex re que valet .x. quia estimatio rei per redditum fructuum estimatur. . . . Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 3.

⁸¹ Azo, *Lectura*, to C. 4, 44, 8, p. 342; *Ibid.*, to *Et reddituum quantitas*: C. 4, 44, 16, p. 343. See above, p. 20.

⁸² Accursius, *Glossa ordinaria*, to *iudicis*: C. 4, 44, 2.

⁸³ Item probabit quod quando petebat consilium quantum valeret homines dicebant ei quod valebat decem. nam per hoc presumitur ignorare quod valebat .x. quia alias in dubio presumitur quis scire vires patrimonii sui ubi ignoraverat. . . . Et hec que dicta sunt, locum habet in his que certa sunt: ut fundus vel domus. sed non in his que dubia sunt: ut nomina et condictionalia. nam ibi spectamus quanti invenit emptor. Odofredus, *Lectura*, to C. 4, 44, 2, fol. 246, col. 3.

⁸⁴ For the whole subject of medieval market conditions, see the summary of Mund, *Open markets*, 13-51. For the problem of monopoly, see below, p. 80.

the limits of *laesio enormis*, and if the just price from which *laesio enormis* was calculated was none other than the current market price, then the element of fraud in sale becomes significant. Within this framework the chief harm that can be perpetrated would be fraudulent actions of buyers and sellers. About the only way to produce deviations beyond the limits of *laesio enormis* based on the market price is by deceitful misrepresentation of the quality or quantity of goods.⁸⁵ Because of the importance of fraud the medieval Romanists considered it necessary to develop a carefully devised and fully explicit system of relationships between sale and fraud. The problem of defining and relating fraud was further complicated by the ambiguous terminology of Classical Roman law which permitted freedom of bargaining. The phrase, *licet contrahentibus se naturaliter circumvenire*, seemed to permit "cheating" or "deception."⁸⁶ The Classical terms *circumvenire* and *circumscribere* passed directly into the language of the medieval Romanists and occasionally the medieval term *decipere* was substituted in their place. In advocating free bargaining did medieval Roman law thereby permit "deception," "cheating," or "fraud" in the setting of prices? The Roman law of Justinian, although considering the problem of bargaining against the general background of actions of good faith exclusive of fraud, made no reconciliation of the conflicting elements.⁸⁷ This task remained for the Romanists of the Middle Ages.

From an early period in the twelfth century the Glossators perfected a system of relationships between fraud and sale, and placed the factor of *laesio enormis* within this scheme. The question seems to have settled as early as the first half of the twelfth century, since a complete picture of it appears in Vacarius, who generally represents this period.⁸⁸ The succeeding Glossators, such as the author of the *Summa Trecensis*, Rogerius, Placentinus, Azo, Odofredus, and the authors of the Hugo-Albericus *Distinctiones*, did little more than to adopt the general system given in Vacarius and add minor embellishments. In a preliminary consideration, Vacarius made the basic distinction of Roman law between actions of strict law (*ius strictum*) and actions of good faith (*bona fides*). Actions of strict law were a special category in Roman law in which contracts affected by fraud remained valid, although the fraud could be remedied through an *exceptio doli*. The other category of Roman law included actions of good faith such as those of sale, and here Vacarius laid down two primary ways in which fraud or *dolus* may affect a contract of sale. It may give cause to the contract or it may be incidental to the contract. *Dolus* which gives cause to a contract occurs when a sale is induced by

deceitful means. Without this fraud the sale would not have taken place. On the justification of the law of Justinian, the medieval Glossators, beginning with Bulgarus, were unanimous in stating that this type of *dolus* nullified the sale altogether, and the contract was not considered as legally binding.⁸⁹

Incidental *dolus*, on the other hand, intervenes at the origin of a contract but does not give it existence. Without this type of fraud the party would have made the contract but on other terms. This incidental fraud, according to Vacarius, did not nullify the contract, but affected it in two manners: *ex proposito* and *re ipsa*. When the deception was the conscious and intentional result of one of the contracting parties, it was termed *dolus ex proposito*. For example, through deceit a seller induces a buyer to purchase something at an unfair price. This fraud did not cause the sale, because the buyer would have normally made the purchase, but at more reasonable terms without the fraud. In this case the contract of sale was valid, but the unfair price caused by intentional deceit could be remedied, as others pointed out, by an *officium iudicis*⁹⁰ even if the injury were of the smallest amount (*unius nummi*).⁹¹

In sharp contrast to intentional or true fraud, *dolus re ipsa* was a fraud resulting not from the will of the parties (*ex proposito*) but from the thing itself (*re ipsa*) which was being sold. As Vacarius suggested and the author of the Hugo-Albericus *Distinctiones* further developed, this type of fraud was permitted to remain in the contract of sale because of the right of free bargaining, but if it were unusually large it could be remedied by *laesio enormis*.⁹² Thus, a price resulting from *dolus re ipsa* could not be rectified unless it exceeded the limits of one-half the just price. In the Romanists' system of sale and fraud, *laesio enormis* was classified as *dolus re ipsa* within the general category of incidental *dolus* and was distinguished from the true types of fraud: *dolus ex proposito* or *dolus* which gives cause to contracts.⁹³

The Glossators attributed a special significance to the *dolus re ipsa* of *laesio enormis* in their discussions of fraud and sale. This type of *dolus* proceeded from

⁸⁹ The Justinian text is D. 4, 4, 7. Cf. Bulgarus, *De dolo*, edited by Kantorowicz, *Studies in the Glossators*, 243. Cf. Fransen, *Le dol*, 37-40.

⁹⁰ Rogerius, *Summa*, to C. 4, 45, in Gaudenzi, *Bibliotheca* 1: 125.

⁹¹ *Summa Trecensis*, Lib. IV, Tit. 45, p. 116.

⁹² *Distinctiones*, collectio Senensis XXVIII, in Gaudenzi, *Bibliotheca* 2:152. Also found in Pescatore, *Die Distinktionensammlung*, 8, 9. Cf. Fransen, *Le dol*, 51, 52.

⁹³ Cf. the slightly different divisions of fraud and sale: Azo, *Lectura*, to C. 4, 44, 10, p. 342. Et hec que dicta sunt vera sunt cum et venditor re ipsa decipitur: non ex proposita, nam si ex proposito, si dolus emptoris causam daret contractui ipso iure non valet venditio. Sed si incideret in venditione, venditio valeret: sed rescinderetur actione dolo. Et quod ista lex habeat locum in emptore sicut et venditore, ita probatur quia eadem est ratio in emptore, que est venditore. unde idem ius debet statui. Odofredus, *Lectura*, to C. 4, 44, fol. 246, col. 2.

⁸⁵ Cf. Schumpeter, *History of economic analysis*, 93.

⁸⁶ See above, p. 17.

⁸⁷ See above, p. 17 and 18.

⁸⁸ Vacarius, *Liber pauperum*, Lib. IV, Lit. 51 to *Quemadmodum*: D. 19, 2, 22, par. 3, p. 155, 156.

a cause independent of the will of the contracting parties. It arose from the thing itself (*re ipsa*) which was being sold. In its essence *dolus re ipsa* was not a deception or a fraud in the normal sense of the word, but actually a mistake in the value of the thing, an error of fact.⁹⁴ This interpretation of *dolus re ipsa* as a mistaken evaluation of price was closely connected with Placentinus' doctrine of knowledge and consent. He proposed that the remedies of *laesio enormis* should be refused to a seller who in certain knowledge sold his goods at a price below one-half the fair value.⁹⁵ This certain knowledge eliminated the possibility of a mistake in price, which was the legitimate cause for invoking *laesio enormis*. Azo reinforced this doctrine of Placentinus in a discussion of renunciation by donation. A seller who donates to the buyer the assumed difference between the contract price and the just price cannot be said to be mistaken and thereby eligible for the protection of *laesio enormis*.⁹⁶ Accursius extended Placentinus' theory of knowledge and consent to the buyer as well as the seller,⁹⁷ and Odofredus likewise approved of the general doctrine.⁹⁸ Throughout the teachings of the Glossators, *dolus re ipsa* was a special type of "fraud" which was to be separated from ordinary *dolus*, which was intentional. In some of the Romanists, such as Vacarius,⁹⁹ Placentinus,¹⁰⁰ Karolus de Tocco,¹⁰¹ this *dolus re ipsa* was carefully termed *iniquitas* or *fraus* to distinguish it from true *dolus*. In all of the Romanists, however, *laesio enormis* was only valid as a remedy for genuine mistakes in price, which were free of intentional *dolus*.¹⁰² This latter fraud had special pro-

tections, which were more severe than those of *dolus re ipsa*.¹⁰³

In the theories of the medieval Glossators the protections of *laesio enormis* were inherently connected with the basic principle of freedom of bargaining. The fundamental distinction between intentional fraud and mistakes in price was also applicable to the principle of free bargaining. This relationship was not explicit at first but by the time of Accursius and Odofredus there was no doubt as to the exact meaning of the Roman law principle. Odofredus quoted the characteristic formula as: *Licetum est contrahentibus invicem se re ipsa decipere*.¹⁰⁴ The presence of *re ipsa* in the phrase clearly placed freedom of bargaining within the category of error as opposed to intentional fraud. Accursius emphasized that in the legitimate bargaining process *dolus* was absent on either side, and the usual terminology *circumvenire* or *decipere* was misleading.¹⁰⁵ Despite their original meanings these terms of free bargaining were totally exclusive of any implication of intentional *dolus* in the Glossators' framework. To the contrary, they merely signify an error in evaluating the price of goods in the bargaining process. In the final medieval analysis, freedom of bargaining gave buyers and sellers not the permission to cheat intentionally and deceive each other, but the right to be mistaken in estimating the price of goods.¹⁰⁶ Any price on which two contracting parties could agree in a bargain free of intentional fraud was the price generally validated by Roman law.

3. THE CANONISTS

(THE CAROLINGIANS, GRATIAN, AND THE DECRETISTS, 750-1190)

I. THE CAROLINGIAN BACKGROUND

The decretals of popes, the canons of councils, and the opinions of Church Fathers of the fourth, fifth, and sixth centuries formed the main body of Canon law which culminated in the *Decretum* of Gratian in the twelfth century. During the late eighth and ninth centuries some of this ancient ecclesiastical material was renewed and used in the legislation of the Carolingian Empire. Moreover, new laws and canons were formulated during the Carolingian period which influenced the Canon law of succeeding centuries.

The Emperor Charlemagne, in comparison to his predecessors and successors, reigned with a strong grasp on his empire. In this position of relative security he was able to issue numerous capitularies on matters of wide range and importance. Political, economic, social,

⁹⁴ The Romanists based this interpretation on D. 45, 1, 36.

Cf. Mémin, *Les vices de consentement* 1: 63; Dekkers, *La lésion énorme*, 44-46; Fransen, *Le dol*, 51, 52.

⁹⁵ Item in summa illud sciendum est quod iudicio meo ei, qui vendidit ex certa sciencia, ultra dimidiam iusti pretii non dabitur rescindendi licencia. Placentinus, *Summa codicis*, to C. 4, 44, p. 176. Text compared with Paris Bibl. Nat. Lat. 4539, fol. 48^a and 4441, fol. 48^a. The Romanist principle *Sciens non deceptus videtur* was apparently inspired by D. 50, 17, 145 and D. 47, 10, 1, par. 5, and confirmed by C. 4, 44, 15. Cf. Dekkers, *La lésion énorme*, 63.

⁹⁶ Azo, *Summa*, to C. 4, 44, p. 114. For the device of donation, see above, p. 26.

⁹⁷ Accursius, *Glossa ordinaria*, to *quaeri potest*: C. 4, 44, 11.

⁹⁸ Sed denuo quero hic ponamus aliquis rem valentem .x. vendidit pro .iiii. et emptor dicit, res ista valet .x. et vendis pro .iiii. dicit venditor, libenter. et ita ponitur in instrumento. nunquid hoc casu poterit venditor venire contra: quia deceptus sit ultra dimidiam iusti precii. Dicimus quod non potest quia scivit, unde qui scivit certiorari non debuit. . . . Et dolus non infertur volenti. Odofredus, *Lectura*, to C. 4, 44, fol. 246, col. 3.

⁹⁹ See above, p. 22, n. 10.

¹⁰⁰ See above, p. 22, n. 13.

¹⁰¹ In hac lege distinctionem doli plene notabis. dolus itaque in contractibus aliter ex proponito aliter ex re ipsa deprehenditur. re ipsa ut cum res minus dimidia iusti pretii fuerit vendita. et hic dolus proprie fraus dicitur. Karolus de Tocco, *Lectura codicis*, to C. 4, 44, 10, Paris Bibl. Nat. Lat. 4546, fol. 78^a.

¹⁰² Additions of Placentinus to Bulgarus, *De diversis regulis*, Reg. LXXVIII, p. 70.

¹⁰³ See above, p. 30.

¹⁰⁴ See above, p. 21, n. 6.

¹⁰⁵ Accursius, *Glossa ordinaria*, to *circumscribere*: D. 19, 2, 22, par. 3.

¹⁰⁶ Fransen, *Le dol*, 54.

educational, and religious conditions came within the domain of his legislation. Many of these capitularies were instructions to the *missi dominici* who circulated widely and periodically throughout the empire as inspectors and itinerant judges for the central imperial power. Generally they traveled in pairs, a count and a bishop, with a broad range of functions over both lay and ecclesiastical administration. Some of these capitularies issued to the *missi dominici* concerned economic conditions, such as usury and unfair prices, but it is difficult to determine whether these instructions were actually laws of the land or whether Charlemagne was merely transmitting Canonical information for the encouragement of the ecclesiastical regime. Certain modern scholars think that such legislation of Charlemagne was not enforced by the lay administration of the empire.¹ Our purpose, however, for examining the Carolingian legislation is not to determine the actual conditions of the time, but rather to trace the antecedents of later Canon law. From a strictly juridical point of view the voluminous legislation of Charlemagne both transmitted and originated certain pieces of legislation of importance to the Canonists of the twelfth and thirteenth centuries. The Carolingian period stands as a preparatory context to later Canonist developments.

A well-known part of the Carolingian economic legislation was the capitularies prohibiting the practice of usury. The Church's stand against usury had already been formulated through arguments based on the Bible, the Fathers, and decisions of popes and councils. Sometime before 774 Pope Adrian I presented to Charlemagne a collection of canons later known as the Dionysio-Hadriana to be used in reforming the Frankish church. Among these texts was a version of canon seventeen of the Nicene Council of 325 which prohibited to the clergy the taking of usury or other transactions of shameful profit.² As defined by this canon usury included the taking of interest not only in loans of money but also in loans of fungible goods, such as wine or grain. In these categories two practices of usury accepted by Roman law, the *centesima* and the *sescuplum*, were forbidden. The *centesima* was a normal rate of interest which amounted to one per cent per month of money lent or 12 per cent *per annum*. The *sescuplum* was a rate of interest in kind and amounted to a return of one and one-half of the goods borrowed.³

This double type of usury forbidden only to the clergy by the Nicene Council was extended in the Carolingian Empire to include all men. The extension of the prohibition of usury to the laity had antecedents prior to the eighth century.⁴ In the fourth century the principle was announced at the Council of Elvira in

Spain and at the First Council of Carthage in Africa.⁵ Pope Leo I attacked lay usury in the fifth century⁶ and certain local councils in Gaul in the seventh century, such as the Council of Clichy, promoted the extension.⁷ In the eighth century Pope Adrian promoted the campaign with renewed vigor. Several English synods under his influence passed the prohibition and in the capitularies of Charlemagne it entered secular legislation for the first time. At the important Imperial Synod of Aachen of 23 March, 789, Charlemagne cited the antecedents of Nicea and Pope Leo I and prohibited the practices of usury to all inhabitants of his empire both lay and clerical (*omnino omnibus*).⁸

At a later council at Nymwegen (Nijmegen) in 806, which was important for Carolingian economic regulation, Charlemagne renewed the legislation against usury and issued another capitulary which defined usury in broad terms.⁹ Usury occurs, as here defined, when "more is demanded back than what is given." Although the capitulary probably implicitly referred solely to contracts of loans (*mutuum*), yet the terminology was sufficiently broad to cast moral doubt by analogy on profits derived from other contracts such as barter, hire, and sale. In any case, later Canonists did explore the relations between profits gained from loans and those from buying and selling.¹⁰

Concurrent with the definition of usury was also the Carolingian conception of *turpe lucrum* or shameful gain which had been previously mentioned in the Nicene Council. This term *turpe lucrum* assumed a wide range of meanings and must always be interpreted from its context. A capitulary of Charlemagne defined it outright as an attempt to gain a thing dishonestly through various deceptions.¹¹ In the broadest sense *turpe lucrum* included all forms of greediness,¹² and was almost synonymous with avarice (*cupiditas*).¹³ In a narrower sense it was often connected with such crimes as simony, usury, and price profiteering. On some occasions it was distinguished from usury and referred to immoral gains generally from exorbitant

⁵ Mansi, *Conciliarum* 2: 9.

⁶ Ep. IV, P.L. 54: 613. Jaffé and Wattenbach, *Regesta*, no. 402.

⁷ C. 1, Concilium Clippiacense, in M.G.H., Maassen, ed., *Concilia*, 197.

⁸ C. 5, Karoli Magni Capitularia, Admonito Generalis, in M.G.H., Boretius, ed., *Capitularia* 1: 54.

⁹ C. 11, Karoli Magni Capitularia, Capitulare Missorum Niumagae datum, *ibid.* 1: 132.

¹⁰ Thinking in Carolingian terms, Schaub defines usury (Wucher) as: "jede vertragsmässige Aneignung eines offenkundigen Mehrwertes." *Der Kampf gegen den Zinswucher*, 72. See below, p. 37 ff.

¹¹ C. 15, Capitulare Missorum Niumagae datum, in M.G.H., Boretius, *Capitularia* 1: 132.

¹² C. 14, Concilium Moguntinense (Mainz), in M.G.H., Werminghoff, ed., *Concilia* 1: 264.

¹³ C. 13, Capitulare Missorum Niumagae datum, in M.G.H., Boretius, *Capitularia* 1: 132.

¹ Cf. Dopsch, *Die Wirtschaftsentwicklung* 2: 273-275.

² Turner, ed., *Ecclesiae occidentalis monumenta*, 270. Turner calls this version *Dionysius I*.

³ Schaub, *Der Kampf gegen den Zinswucher*, 30.

⁴ LeBras, Gabriel in *Dictionnaire de théologie catholique*, v° *usure*.

prices.¹⁴ In connection with the legislation against usury, the Carolingians attempted to curb *turpe lucrum* in general and price profiteering in particular.¹⁵

The Carolingian legislation concerning prices attempted to protect both buyers and sellers from the abuses of price profiteering. In the year 806 the Nymwegan capitularies urged all the great lay and ecclesiastical lords of the realm to ameliorate the famine conditions of the empire by providing for their households (*familia*) from the produce of their own lands. If after providing for their retainers, they discovered that they had surplus produce to sell, they might sell this produce at prices which did not exceed certain fixed levels.¹⁶ In fact, the Carolingians on other occasions also attempted to set maximum prices for basic foodstuffs, such as oats, rye, and wheat.¹⁷ Implementing these wide-reaching attempts to regulate prices were also attempts to standardize means of measurement.¹⁸

The purpose of this price regulation of basic foodstuffs was to protect buyers from the depredations of sellers at whose mercy famine and other extreme conditions had placed them. A corollary to these price ceilings was a prohibition against prices set through speculative practices. Any practice arising from a motive of greed of buying foodstuffs during the time of harvest when prices were cheap in order to sell at a time, supposedly during the winter or famine, when the prices increased, was condemned as being *turpe lucrum*. The transaction was legitimate if goods were bought and later sold out of necessity. Speculative buying and selling, however, was completely prohibited.¹⁹ This text originated in the Carolingian period, although later Canonists attempted to attribute it to Pope Julius I of the fourth century. It was kept alive in the collections of Canon law from the ninth to the twelfth century when it was finally included in the *Decretum* of Gratian and became an important part of the Canonist theories of buying and selling. Another protection to the buyer was issued in behalf of travelers and strangers. Inhabitants were prohibited from selling goods to strangers at prices higher than the local market levels. This regulation was to be enforced by the local priests.²⁰ As was the case in Roman law, price discrimination was immoral.

¹⁴ C. 5, Synod of Chalons, in M.G.H., Werminghoff, *Concilia* 1: 275; C. 32, Synod of Rheims, *ibid.* 1: 256; C. 8, Synod of Aachen, Mansi, *Conciliarum* 14: 682. Cf., Schaub, *Der Kampf gegen den Zinswucher*, 76.

¹⁵ Dopsch, *Wirtschaftsentwicklung*, 266.

¹⁶ C. 18, Capitulare Missorum Niumagae datum, in M.G.H., Boretius, *Capitularia* 1: 132.

¹⁷ A similar example can be given from C.4 of the Council of Frankfurt in 794 in M.G.H., Werminghoff, *Concilia* 1: 166.

¹⁸ C. 18, Capitulare Missorum Niumagae, in M.G.H., Boretius, *Capitularia* 1: 132.

¹⁹ C. 17, *ibid.* For an English translation, see below, p. 36.

²⁰ C. 13, Karolomanni Capitulare Vernese, in M.G.H., Boretius, *Capitularia* 2: 375.

Sellers also qualified for certain protections in the Carolingian legislation, when they could demonstrate unusual distress in their situations. More powerful landowners were forbidden to coerce by malicious means poorer small landowners into selling their properties at ridiculously low rates during periods of famine or distress.²¹ When the poor were forced to dispose of their goods, all such transactions must be held in public before the normal number of witnesses, presumably to prevent coercive or unfair methods.²²

A necessary element implied in the Carolingian price regulation was a conception of a fair or just price. Every piece of legislation protecting either buyer or seller from undue harm, or every capitulary governing the prices of basic commodities naturally presupposed some idea of a just price. Sometimes this fair price was called *dignum pretium*²³ but more often simply *justum pretium*. For example, an early capitulary of Charlemagne and his son Pepin alluded to an attempt to enforce a just price in Italy after the Carolingian army had assumed control of a particular region. A seller claimed that he was compelled to sell some goods at an unjust price. Both the seller and the buyer and a group of "estimators" convened for the judgment. The exact price of the sale was recalled, and the value of the goods at the time of the sale (in this case before the arrival of the army) was assessed. If there was no discrepancy between the accepted price and the value of the goods (*justum pretium*), the sale naturally held. If, however, the goods were valued more than the price and if the seller could prove by the charter of sale or other means that he sold the goods at a low price because of dire necessity, the contract was rescinded. The goods were returned to the seller and the original price to the buyer with various compensatory arrangements for improvements and labor.²⁴

Evidence does not exist to assume that similar measures enforced a just price generally throughout the Carolingian empire; rather this capitulary has the characteristics of a specific piece of legislation to ameliorate a specific, unjust situation. Neither have documents been found which give us an explicit discussion of the just price during Carolingian times. Modern students of the period think that, if anything, the just price was tacitly assumed to be the current price.²⁵ How this

²¹ C. 16, Capitulare missorum in Theodonis villa datum secundum Generale, Karoli Magni Capitularia, in *ibid.* 1: 125 and 410.

²² C. 7, Concilium Mogentinese (Mainz), in M.G.H., Werminghoff, *Concilia* 1: 262.

²³ C. 7, Widonis Capitulo Electionis, in M.G.H., Boretius, *Capitularia* 2: 105.

²⁴ C. 2, Karoli Magni Notitia Italica, Karoli Magni et Pippini Filii Capitularia Italica, in *ibid.* 1: 187, 188.

²⁵ *Ibid.* 2: 252. Cf. Dopsch, *Wirtschaftsentwicklung*, 262, 263. Schaub, *Der Kampf gegen den Zinswucher*, 93, 94. From the Carolingian material Schaub inferred the following elements in the determining of the just price: the usefulness of the goods, the sacrifice to demand them, the degree of necessity to have them, and the ability of the buyer to pay the price.

current price was used as the just price is not quite clear. Often it seems to have been equated with the customary practices of the market. The geographical extent of these customary practices varied considerably. At times they included the practices of many diverse areas.²⁶ At other times they included the custom of a single region,²⁷ and occasionally they reproduced the experience of a single market place.²⁸ Nonetheless, in Carolingian terms the just price was generally related to the fundamental factor of the current price.

The Carolingian period also witnessed some early developments of the Canonist doctrine defining the role of the clergy in secular affairs and more specifically in economic activities. The Synod of Aachen in 816 renewed the decretal *Consequens* of Pope Gelasius I which in a general way ordered the clergy to abstain from secular affairs such as economic enterprises for the purpose of dishonest and shameful gain.²⁹ The canon *Decrevit*, however, made some exceptions to the general prohibition against secular affairs. Clerics could undertake legal and business affairs for orphans and widows, who were considered to be special wards of the Church. This canon, although attributed to Pope Melchiades, probably originated in an ancient Church council and was included in the forged decretals of the Pseudoisidorian Collection composed either in Rheims or Le Mans sometime between 847 and 854.³⁰ This program for the clergy was later adopted by the Canonists of the twelfth century. Another duty of the clergy was not only to abstain from usury and the practices of *turpe lucrum*, but also to teach the common people to refrain from such activities. This canon originated in the collection of capitularies of Abbot Ansegisus of 827 and was passed on through the collections of Regino of Prüm (906), Burchard of Worms (1012), and Ivo of Chartes (ca. 1094). Although it was never included in the definitive collection of Gratian of the twelfth century, it might be considered as the justification of the later Canonists in promoting their doctrines of sale and the just price.³¹

Not only was the clergy prohibited from participating unrestrictedly in economic activities, but also the laity was warned against the pitfalls of commercial enterprises. The fifth-century decretal *Qualitas* of Pope Leo I, which implied the morally dangerous character of buying and selling, was perpetuated by most of the

important collections of Canon law, and was not unknown in the Carolingian era.³² It can be found in the penitentials of Haligar of Cambrai (817–835) and Rabanus Maurus (830–837) and also in the Pseudoisidorian Decretals (847–852).³³ A canon of 797 of Theodulfus, bishop of Orleans, summarized the Carolingian ecclesiastical warnings towards the laity who engage in commercial affairs. Those who undertake enterprises to provide the necessary things of life or to pay their tithes and to give alms may labor without danger, but those who are engaged in mercantile activities for the purpose of earthly gain risk losing their souls.³⁴

In the political and ecclesiastical legislation of the Carolingian civilization we may discern almost all of the elements of the twelfth-century program for buying and selling and the just price. Usury was universally prohibited and defined in the broadest terms. Warnings were issued against practices for the sake of *turpe lucrum*. Measures were taken to relieve oppressed buyers and sellers out of which arose a sharp condemnation of speculative transactions. The just price itself was employed and equated generally with the current price. The definition of the role of the clergy in economic affairs was begun, and the dangers to the laity of commercial activities were pointed out. The Carolingian era was a period of experimental legislation. It originated or transmitted from earlier sources a series of political capitularies and ecclesiastical canons, which the Canonists of the intervening centuries passed on to become the legal heritage of the revival of Canon law in the twelfth century. The Canonists of the twelfth and thirteenth centuries received these legacies of experimental legislation and constructed from them a logical and systematic program. In a large measure the Canonists of the twelfth and thirteenth centuries rationalized and theorized upon what the Carolingians had created.

II. GRATIAN AND THE DECRETUM

The chaos produced by the invasions of the late ninth and tenth centuries soon obliterated the social and economic legislation of the Carolingian civilization. Although the enforcement of this program was discontinued, the remembrance of these efforts was not completely lost to posterity. From the ninth until the twelfth century a fragmentary record of the defunct Carolingian legislation was preserved by a chain of collections of ecclesiastical law. Such collections as Dionysio-Hadriana, Pseudoisidore, and *Anselmo dedicata* in the ninth century, Regino of Prüm in the

²⁶ C. 7, Widonis Capitulo Electionis, in M.G.H., Boretius, *Capitularia* 2: 105. Cf. Schaub, *Der Kampf gegen den Zinswucher*, 100, n. 4.

²⁷ C. 1, Widonis Imperatoris Capitulare Papiense legibus addendum, in *ibid.* 2: 107.

²⁸ See above, p. 33, n. 20.

²⁹ C. 93, Concilium Aquigranese, in M.G.H., Werminghoff, *Concilia* 1: 369, 370. The text has finally come down to us in Gratian, *Di.* LXXXVIII, c. 2, *Consequens*.

³⁰ Hinschius, ed., *Decretales Pseudoisidorianae*, 248, 249. The text is included in Gratian, *Di.* LXXXVIII, c. 1, *Decrevit*.

³¹ C. 36, Ansegisi Abbatis Capitularium Collectio, Lib. I, in M.G.H., Boretius, *Capitularia* 1: 422.

³² See above, p. 14, n. 34.

³³ Haligar of Cambrai, *De vitiis et virtutibus*, Lib. III, c. 6, in P.L. 105: 678; Rabanus Maurus, *Poenitentiale*, c. 39, in P.L. 112: 1424; Hinschius, *Decretales Pseudoisidorianae*, 617.

³⁴ C. 35, Capitulare Theodulfi Episcopi Aurelianensis ad parochiae suae sacerdotes, in Mansi, *Conciliorum* 13: 1004.

tenth century, Burchard of Worms and Anselm of Lucca in the eleventh century, and Ivo of Chartres in the early twelfth century—to name a few—transmitted this legislation in irregular succession to the definitive compilation of Gratian of the twelfth century. The chief contribution of these early Canonists was merely to preserve the ancient legislation. They did little to change or develop the ideas they transmitted. Further discussions awaited the renewed efforts of later Canonists.

The city of Bologna which had become a center for the Glossators of Roman law during the twelfth century likewise saw the growth of an important school of Canon law. In 1140 a Bolognese monk named Gratian published a compilation of ecclesiastical law that was to become one of the definitive collections of the Church in the Middle Ages. This *Decretum*, as it was most commonly entitled, represented not only the largest single collection of Canon law in its time, but also a systematic textbook of ecclesiastical jurisprudence. Almost immediately after its publication Gratian's collection was accepted by both the schools of Church law and the ecclesiastical courts as the most important and authoritative text in Canon law. From the date of its appearance, until the beginning of the thirteenth century, it dominated the energies of the growing schools of Canonists. For over sixty years it drew the concentration of some of the best minds of the period in explaining, elaborating upon, and interpreting its text. Even after the turn of the century, when collections of recent papal decretals attracted the attention of the Canonists, it remained an integral part of the body of Canon law. This dominating role of Gratian's *Decretum* has an important consequence for the development of the Canonists' theories of economics and more particularly their conception of the just price. The Canonists were devoted to explaining and interpreting its text. The *Decretum* posed the problems for their thinking, fixed the boundaries of their discussions, and influenced the terms of their solutions. In order to evaluate the Canonists' contributions to the doctrine of the just price, the frame of reference set by Gratian's *Decretum* should be examined.

As presented to the Canonists of the twelfth century, the principal context for discussing the problem of sale was that of the general subject of usury. Since usury was one of the chief, or at least one of the most notorious economic heresies of the early Middle Ages, the sections of the *Decretum* devoted to the subject were the most convenient for the discussion of economic theory. In the *Decretum* of Gratian the subject of usury was treated in two general sections. The first and less important is found at the end of *Distinctio* XLVI and the beginning of *Distinctio* XLVII, where Gratian collected a series of texts forbidding the practice of usury specifically to all orders of clerics. Among these texts was the important canon of the

Nicene Council forbidding several usurious practices to clerics, here presented in the version of the Dionysio-Hadriana collection.³⁵ The other and more important section on usury consisted of *Questiones* III and IV of *Causa* XIV. *Questio* III immediately attacked the problem of defining what was meant by usury. In seeking to summarize his definition of usury, Gratian employed at the end of a series of texts the canon which we have met in the Carolingian period, and which was preserved for over three hundred years with almost no alteration in the collections of Regino of Prüm, Burchard of Worms, and the *Decretum* and *Panormia* of Ivo of Chartres. In selecting this text Gratian chose a broad interpretation for the definition of usury—that is, usury occurs when more is demanded back than what is given.³⁶ To further demonstrate this interpretation Gratian preceded the general rule with three patristic texts specifying what was meant. According to Ambrose some people had supposed that usury pertained only to money, forgetting that usury could also be committed with goods, because whatever exceeds the principal is usury.³⁷ Jerome went as far as to equate receiving more than what is given with any form of superabundance.³⁸ Finally such goods as grain, wine, and oil were enumerated by Augustine.³⁹ In order to summarize the whole definition of usury, Gratian adopted the phrase of Ambrose: "Behold it is evident that whatever is demanded beyond the principal is usury." Stated either as "demanding back more than what is given" or "anything that exceeded the principal," usury was presented as to have analogous implications for profits gained from sale.

In *Questio* IV Gratian broadened the scope of application of the definition of usury to include a wider range of persons and transactions. The Nicene canon against usury by the clergy was again cited, this time in the Hispana Pseudoisidorian version.⁴⁰ In a preceding text the laity were also forbidden to take usury. This principle was derived from the statement of Pope Leo I, which had formerly influenced the Carolingian legislation.⁴¹ In further application of usury principles, a canon was included which stated that if a cleric lends money, he may receive payment in goods (which normally would have been sold to repay the loan in money) provided that the cleric receives no increased value in goods from what he had originally lent in money.⁴² To this canon Gratian prefixed the rubric: *Pro pecunia, quam clericus dedit, iusto pretio species accipere potest*. In this phrase is the first mention of the term "just price" in the Canon law of the twelfth

³⁵ *Di.* XLVII, c. 2, *Quoniam*. See above, p. 32, n. 2.

³⁶ *Causa* XIV, q. 3, c. 4, *Usura*. See above, p. 32, n. 9.

³⁷ *Causa*, XIV, q. 3, c. 3, *Plerique*.

³⁸ *Causa* XIV, q. 3, c. 2, *Putant*.

³⁹ *Causa* XIV, q. 3, c. 1, *Si foeneraveris*.

⁴⁰ *Causa* XIV, q. 4, c. 7, *Quoniam*.

⁴¹ *Causa* XIV, q. 4, c. 8, *Nec hoc*. See above, p. 32, n. 6.

⁴² *Causa* XIV, q. 4, c. 5, *Si quis clericus*.

century, and at this point it referred to an exact equivalent of goods returned for money lent.

Not only were the usury prohibitions widened to include the laity as well as the clergy, but also a moral stigma similar to that of usury was linked with other types of contracts, notably buying and selling for gain. First and foremost the famous Carolingian capitulary against speculative transactions was firmly embedded in the *corpus* of the Canon law after having been preserved in almost every important law collection in the interim period:

Whoever buys grain and wine in the time of harvest or vintage not out of necessity but for the sake of avarice—for example, whoever buys one measure for two pennies and waits until it is sold for four or six pennies or more—that one, we say, acquires shameful profit.

In the Gratian version of the text the prohibition against such speculative selling was even stronger than the original Carolingian capitulary. The one justification—that of necessity—for such kinds of transactions was de-emphasized, and all speculative transactions for the sake of greed were banned equally.⁴³ Gratian summarized the provisions of the statute by labeling all transactions of buying cheap to sell dear as *turpe lucrum*.⁴⁴ While this particular prohibition of speculative practices was directed against both the laity and the clergy, other canons stigmatizing certain practices of buying and selling along with usury were designated exclusively for the clergy. In one canon recalling the words of the Nicene Council degradation from office was threatened against any cleric who practiced usury or acquired *turpe lucrum* through transactions of buying and selling.⁴⁵ Another canon clarified and strengthened this latter prohibition. Any cleric who insisted upon buying cheap for the purpose of selling dear was to be removed from his office.⁴⁶ Thus usury was banned unequivocally, and moral doubts were cast on other economic transactions, such as certain forms of sale.

The canons in the sections on usury which prohibited certain kinds of buying and selling to clerics presupposed a fundamental distinction in Canon law—that of a basic difference between clerics and laymen. Not every activity unlawful for the clergy would be necessarily immoral for the laity. Another section of the *Decretum* of Gratian which was relevant to the Canonists' ideas of the just price was founded on this basic difference. *Distinctio* LXXXVIII of the *Decretum* denied the practices of secular transactions (*negotia saecularia*) to all orders of the clergy. This conception of the role of the clergy had already been anticipated in the Carolingian period and two of the important

canons collected by Gratian had already been a part of the ninth-century legacy.⁴⁷ The best known and most often cited text of this section was an excerpt from St. Augustine, which generally denied *negotia* to the clergy.⁴⁸ *Questio* III of *Causa* XXI was the logical continuation of *Distinctio* LXXXVIII. Here clerics were forbidden to manage unlawful business affairs or to seek shameful profits for the purpose of sustenance.⁴⁹ The general rule derived from these two sections was that the clergy was barred from all business enterprises apart from the management of their ecclesiastical properties. Only two exceptions existed to this principle. The clergy could manage the estates of widows and orphans as wards of the Church on the grounds that these classes of *miserabiles personae* merited special protection.⁵⁰

As a whole, the properties of the Church constituted the largest economic concentration in the Middle Ages. Naturally these vast holdings of land and property demanded a great amount of business management, and scattered throughout the *Decretum* of Gratian are various regulations governing the administration of ecclesiastical estates. A part of this administration included the buying and selling of various kinds of property. Cases concerning these affairs lay scattered throughout the body of the *Decretum*, and an example of this kind of legislation may be found in *Causa* X, q. 2, c. 2, *Hoc ius*, which excerpted from the Novellae of Justinian a series of ten passages concerning the disposal of ecclesiastical property for the liquidation of debts. Recent textual criticism attributes the insertion of these texts of Roman law not to Gratian but to the succeeding school of Canonists who completed the edition of the *Decretum*. Among the means for disposing these church goods was public sale, and here the principle of the just price became pertinent.⁵¹ These cases, however, being more practical in nature were

⁴⁷ *Di.* LXXXVIII, c. 1, *Decrevit* and *Di.* LXXXVIII, c. 2, *Consequens*. See above, p. 34, n. 29 and n. 30.

⁴⁸ *Di.* LXXXVIII, c. 10 *Fornicari*.

⁴⁹ Gratian's preface to *Causa* XXI, q. 3. Also, *Causa* XXI, q. 3, c. 3, *Placuit*.

⁵⁰ *Di.* LXXXVIII, c. 1, *Decrevit* and *Causa* XXI, q. 3, c. 1, *Pervenit*. See above, p. 34.

⁵¹ *Causa* X, q. 2, c. 2, *Hoc ius*, par. 1. The particular excerpt in question originated from Novella 120, c. 6. It was probably known to the post-Gratian editors of the *Decretum* either as an addition to the Code at C. 1, 2, 14 or directly through the *Authenticum* of the Bolognese school of Roman law. Cf. the conclusions of Vetulani, Adam, Une suite d'études pour servir à l'histoire du Décret de Gratien, *Rev. hist. Droit*, (IV^e série) 16: 674, 675, 1937, which were later revised in: Gratien et le droit romain, *ibid.* 23: 11–14, esp. 24, 47, 48, 1946, 1947. Although Vetulani cannot directly account for the excerpts of *Causa* X, q. 2, c. 2, *Hoc ius*, nonetheless, he attributes them to the general post-Gratian influence of Roman law in the *Decretum*. This conclusion appears to be confirmed by the *Summa Parisiensis*, written about 1160. *Summa Parisiensis*, to *Causa* X, q. 2, c. 2, *Hoc ius*, p. 143, 144. Cf. the comment of McLaughlin p. XIV.

⁴³ *Causa* XIV, q. 4, c. 9, *Quicumque*. For the original Carolingian text, see above, p. 33, n. 19.

⁴⁴ *Turpe lucrum sequitur, qui minus emit, ut plus vendat.*

⁴⁵ *Causa* XIV, q. 4, c. 4, *Si quis oblitus*.

⁴⁶ *Causa* XIV, q. 4, c. 3, *Canonum*.

naturally of less importance to the Canonists' discussions of the just price than the sections on usury where the issues were more specifically ethical.

A final section of Gratian's *Decretum* which was important for the subsequent Canonist theories of the just price was the canon *Qualitas* which concerned the inadvisability of penitents to undertake commercial transactions.⁵² This statute which originated from Pope Leo I, as we have seen, was also known during the Carolingian era.⁵³ Its popularity in the intervening period until Gratian is attested by its inclusion in most of the important Canonical collections. The kind of profit, according to the canon, either condemns or exonerates the transaction because there are transactions of both honorable and shameful profit. It is to the advantage of those undergoing penance to avoid such affairs because it is difficult to transact commercial affairs of buying and selling without committing sin (. . . *quia difficile est inter eumentis vendentisque commercium non intervenire peccatum*). The final phrase was of greatest importance because it threw moral doubt on all activities of sale whether conducted by cleric or laymen.

III. THE DECRETISTS

Gratian's great contribution to the study of Canon law in the twelfth century was not only to compile an authoritative text of law, but also to father a school of Canon lawyers who explained and interpreted that law throughout the remaining centuries of the Middle Ages. This school of Canonists was centered at Bologna and throughout the twelfth and thirteenth centuries it dominated the study of Canon law in Western Europe. The early Canonists have often been called Decretists because of their special attention to the *Decretum* of Gratian. In many ways these Canonists played a unique role in the history of medieval society. Their activities spanned two levels of human existence—both that of thought and action. On one hand they were scholars formed by the best traditions of the rapidly expanding medieval universities. They took their places alongside their intellectual colleagues, the theologians and the philosophers, to be trained in Biblical studies and scholastic theology. They learned their first principles well, especially those of their *metiér*, the Christian ethic. But they were more than speculative thinkers, and herein lies their unique character. They were also men of action. It was their task to apply Christian first principles to the affairs of everyday life. In a full measure they sought to conform practice to theory and to make theory practical for living. Their domain of activity was law, which in a real way was an instrument for bridging the realms of thought and action. As one has expressed it, "the ideal of the

golden age of the canonists was to make a working reality the Kingdom of God on earth."⁵⁴

From the canons of specific ecclesiastical and secular legislation assembled in the *Decretum* of Gratian, the Decretists of the twelfth century constructed a systematic theory of buying and selling. This system of sale formed a fundamental background to the doctrine of the just price. As we have seen, in many ways one of the chief economic-moral problems of the early Middle Ages was that of usury. This medieval preoccupation with the intricacies of usury was reflected in the Canonical collections up until the time of Gratian. He, also, thought chiefly in terms of usury as indicated by his arrangement of the *Decretum*. Most questions of theoretical economic importance, including buying and selling, were placed under sections and titles pertaining to usury. Since the role assigned to the early Decretists was that of explaining and interpreting the text of Gratian, it was only natural that they likewise thought of buying and selling in relation to usury.

The connection between usury and sale, however, was perhaps more than one of systematic organization and legal classification. There were also similarities between the two spheres of activity. As presented in the canons collected by Gratian, usury was defined in the broadest terms possible as: anything which exceeded the principal, or whenever more is demanded back than what is given, or any form of superabundance. Technically speaking, these formulas applied only to contracts of loans (*mutuum*) and not to other contracts unless a loan was implicit, as later Canonists pointed out.⁵⁵ If a loan was not completely gratuitous it was thereby usurious. Nonetheless, implicitly or explicitly, the Decretists could not help but see the relation between this general conception of usury and profits acquired through buying and selling.⁵⁶ As a matter of fact, two of these three forms of the usury formula were applied specifically to the activity of buying and selling. For example, Simon of Bisignano (d. 1215) in a commentary on the canon, *Causa XIV*, q. 3, c. 3, *Plerique*, where the first of the three broad definitions of usury is found, dealt with the practical applications of this principle to various types of economic contracts. Certain cases of security, letting, and hiring, as for example, the letting of a house or the hiring of a horse, cannot be considered as usurious. Buying cheap to sell dear also is not a form of usury when certain conditions have been met.⁵⁷ The *Summa tractaturus*

⁵⁴ Smith, A. L., *Church and State in the Middle Ages*, 51, quoted in Ullmann, Walter, *Medieval papalism*, 1, London, Methuen, 1949.

⁵⁵ Bartholomew of Brescia, *Glossa ordinaria*, to *Quod autem: Causa XIV*, q. 3.

⁵⁶ This relationship between usury and sale is the thesis of Endemann, although it is unduly emphasized. Endemann, *Studien* 2: 4, 5.

⁵⁷ Item de mercatoribus queritur qui ea intentione vilis emunt ut carius vendantur an debeant usurarii dici et non

⁵² *De poen.* V, c. 2, *Qualitas*.

⁵³ See above, p. 14, n. 34 and p. 34.

magister (ca. 1170–1190) examined the question of whether the different forms of *superabundantia* acquired by loans, sale, security, etc. were really usurious. In certain cases of sale the author decided the question in the negative.⁵⁸ The Decretists of the twelfth century were unanimous in agreeing that although usury might have implications for sale as a general rule this logical connection was not valid. Profits from loans, therefore, were usually termed *usura* to be distinguished from immoral profits derived from sale, which were called *turpe lucrum*.⁵⁹

The general theories of the Decretists on the subject of buying and selling were prefaced by a vigorous attack against the position of the merchant. This attack is found in *Distinctio* LXXXVIII of the *Decretum*, the section concerning secular transactions for clerics, and consists of three quotations marshalled from Patristic authorities against activities of a purely commercial nature. Scattered throughout the text of the *Decretum* as printed since the sixteenth century are some 166 quotations from different authorities which were not compiled by Gratian but were inserted at a later date. These citations, added in support of various arguments of the law, were originally written in the margins or appended to the ends of sections, and later included as part of the original text. They have been called *paleae* by later scholars after the name of Paucapalea (fl. 1140–1148) who added a considerable number of them. The three Patristic texts against merchants were added to the *Decretum* sometime before the *Summa* of Huguccio in 1188,⁶⁰ and possibly as early as the period of Paucapalea. Although these three texts were excerpted from the writings of ancient authorities, they

are not entirely irrelevant to the twelfth-century conceptions of the problem of sale. The very fact that these specific citations were selected and included in the text at that time indicates that they represented a certain segment of Canonist opinion, albeit a rather conservative attitude.

Supporting the general thesis of the canon, *De poen.* V, c. 2, *Qualitas*, that it is difficult to transact affairs of buying and selling without committing sin and that of Gratian's rubric that buying cheap to sell dear is *turpe lucrum*, these three authorities impugned strongly the moral position of the merchant. The first text was a long quotation taken from an apocryphal homily originating in the fifth or sixth century and attributed falsely to John Chrysostom.⁶¹ Commenting on the well-known Gospel account of Christ expelling the buyers and sellers from the temple, the author concluded that no merchant can please God. No Christian should be a merchant, because no one is able to buy and sell without lying and cheating. Deceit is at the very base of merchandising (*negotiatio*). Just as one sifts grain and only the chaff is left, so nothing remains of merchandising but the sinful practices. All men of business, however, are not merchants (*mercatores*, or *negotiatores*) in the truest sense of the word. For example, craftsmen, who buy material and through work and skill produce finished products to be sold at a profit, are excluded from this category. Only those who perform purely commercial services, who buy goods, and without improvements, sell them for a profit, are true merchants. These are the ones whom Christ ejected from the temple.⁶²

The second *palea* consisted of a series of excerpts from Augustine's commentary to Psalm 70: 15. This passage, as we have seen, essentially justified the merchant's profits on the basis of labor and exonerated the merchant from the basic objection of immorality by separating the profession from the sinful tendencies of human nature. Although the Canonist of the twelfth century who added this *palea* included the important elements of the Augustinian discussion, he blunted their force by adding other sections which were less friendly to the position of the merchant. For example, he included statements which accused the merchant of seeking glory by his own works instead of searching for true peace which is in God. The combination of the positive and negative attitudes of these excerpts somewhat confused the over-all tone of the Augustinian passage.⁶³ Finally, a third quotation based on the same

indicatur quia vel artem meliorationis rei empte inpendunt vel operas suas et curam adhibent et negociacio est eis concessa. . . . Si vero nil horum faciunt an usuram exercentur. ad presens diffinire nolumus. canon tamen dicit hoc esse turpe lucrum. Simon of Bisignano, *Summa*, to *Causa* XIV, q. 3, c. 3, *Plerique*, Paris Bibl. Nat. Lat. 3934A, fol. 78^{ra}.

⁵⁸ Ad evidentiam huius questionis et sequentis sciendum quod superhabundantia recepta aut ex mutuo aut ex empto aut ex pignore. Ex mutuo non licet accipere aliquam superhabundantiam ex pacto vel intentione. alioquin est usura. . . . Sicut ex empto quandoque recipiatur amplius solo eventu causa necessitatis vel utilitatis. et tunc non est peccatum. . . . *Summa tractaturus magister*, to *Causa* XIV, q. 3, pr., Paris Bibl. Nat. Lat. 15994, fol. 57^{vb}, 58^{ra}.

⁵⁹ E.g. *Causa* XIV, q. 4, c. 4, *Si quis oblitus* and *Causa* XIV, q. 4, c. 9, *Quicumque*. Cf. McLaughlin, *Med. Stud.* 1: 124, 125, 1939. This distinction between *usura* and *turpe lucrum* was not always rigorously held.

⁶⁰ The three *paleae* comprising c. 11, c. 12, c. 13 of *Di* LXXXVIII are all found in manuscripts C, D, and F (later hand) of Friedberg's edition of the *Decretum*, and not in manuscripts A, B, E, G and H. Friedberg's edition of the *Decretum*, however, is not the latest word on manuscript sources. Huguccio was the first of the Decretists, whom I could find, to refer to the *palea* *Eicens*, c. 11. Huguccio, *Summa*, to *Causa* XIV, q. 3, pr., Paris Bibl. Nat. Lat. 15397, fol. 4^{ra}. *Eicens* was also attributed to a certain Gregory by Raymond of Peñafort and Hostiensis in the thirteenth century. Cf. McLaughlin, *Med. Stud.* 1: 110, n. 234, 1939.

⁶¹ For the original text see P.G. 56: 839, 840. The background for the text is discussed in Batiffol, *Ancienne littératures chrétiennes, Littérature grecque*, 328, Paris, 1898, and Bardenhewer, O., *Geschichte der alt-kirchlichen Literatur* 3: 597, Freiburg in Br., Herder, 1923.

⁶² *Di* LXVIII, c. 11, *Eicens*. The author goes on to say that the worst kind of merchants are usurers and gives three arguments against their practices.

⁶³ *Di* LXXXVIII, c. 12, *Quoniam*. For a fuller discussion of the passage, see above, p. 15.

Psalm and appended to the *Decretum* was the statement of Cassiodorus that transactions consisted of nothing more than buying cheap to sell dear. Merchants are an abomination because they neglect the righteousness of God for an inordinate desire for money and burden their wares with lies (*perjuriis*) even more than with prices (*pretiis*).⁶⁴ With the exception of the indecisive excerpts of Augustine, the common factor of these three opinions was their condemnation of purely commercial activities. All enterprises of buying and selling, which excluded any form of craftsmanship, were, at least in practice, extremely immoral affairs. A successful merchant risked two dangers: he was almost always compelled to use immoral means of cheating and lying if he wished to succeed, and if he did succeed, he was in danger of forgetting about God and his soul's health in an insane passion for wealth. Merchandising, pure buying and selling, was reprobate.

A lively economic environment such as that of the twelfth century could not support such unequivocal condemnations of merchants and commercial enterprises. The Canonists of this period, who were particularly sensitive to the influence of practical affairs, could not help but feel the necessity of modifying these ancient and arbitrary judgments about merchants and commerce. Hence, from the material of usury regulations the Decretists constructed a theory of buying and selling which revised the condemnations of these Patristic *paleae*.

Apparently the first Decretist who saw the need of revising the universal condemnation against commerce was Rufinus who composed his *Summa* between 1157 and 1159. He realized that a closer analysis of the economic processes of buying and selling was necessary in order to apply a more intelligent moral evaluation to these functions. In a section concerning usury he examined the cases of profit made by merchants in transactions of buying cheap and selling dear. He envisaged such transactions of sale systematically under three broad categories. First of all, there is the case of one who buys goods for his own or household use with no intention of reselling these goods at a profit. At a later date, he discovers that he is forced through circumstances of necessity (*necessitas*) or expediency (*utilitas*) to sell these goods. If he can show that his motives for resale were those of necessity and not of profit, he may sell the goods even at a higher price than for which he originally bought them. This category of buying cheap and selling dear because of necessity Rufinus permitted to both laity and clergy.⁶⁵ The second category deals with artisans and craftsmen and occurs when one buys goods cheap and then by changing or improving them, he is able to sell them at a higher price. The higher price for which he sells the goods is justified by both the expenses (*impensum*) and the

labor (*labor*) he as an artisan has expended upon the goods in order to improve them. This type of business (*negotiatio*) is essentially honorable (*honestus*) and is permitted always to the laity and only occasionally to the clergy. The clergy are allowed to exercise crafts when they have not sufficient food and clothing, although they are warned against dishonest craftsmanship and involving themselves too closely with commercial shops.⁶⁶

The final category of buying cheap to sell dear is exclusive of the first two. If one buys goods cheap with the sole motive of selling them later at a higher price for profit without having changed the form of the goods through added expenses or labor and without being compelled to do so by necessity or expediency, then that one is conducting a commercial enterprise (*negotiatio*) in the truest sense of the word. This pure merchandising, although permitted (*licitus*) to the laity, was unconditionally forbidden to the clergy. To the laity it could be an honorable (*honestus*) or a shameful (*turpis*) affair. If no labor or expenses were involved, for example, if one made profits by observing the market and buying in times of plenty and selling in times of famine, the enterprise was immoral. In this judgment Rufinus was well supported by anti-speculation legislation since the ninth century. If, however, heavy expenditures had been made or if the merchant was fatigued by hard labor, then the enterprise was assessed as honorable, unless some other unworthy means intervened.⁶⁷ By emphasizing the factors of expense and labor, Rufinus began the Canonists' redemption of the profession of the merchant. In dividing sale into these three categories he set the fundamental pattern for succeeding Decretists. His analysis of sale became the basis of the twelfth-century Canonist solution to the problem.

The importance of the analysis of Rufinus is illustrated by the attitude of the Decretists who followed him. Stephen of Tournai (d. 1203) apparently disagreed with him on a minor point, that of the role of the clergy. He felt that commercial transactions should not be permitted to the clergy, either in times of necessity nor for providing for the poor.⁶⁸ The *Summae Quoniam status ecclesiarum* (1160-1171?) and *Cum in tres partes* (twelfth century) also emphasized unequivocally the prohibition against clerical business transactions and recommended the suspension of clergy who persisted in them.⁶⁹ Whatever the controversy,

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ Stephen of Tournai, *Summa*, to Di. LXXXVIII, c. 2, *Consequens*, p. 110.

⁶⁹ Noverint clerici ab omni cuiuslibet negotiationis ingenio vel cupiditate cessandum. In quocumque autem gradu sint si cessare noluerint a clericalibus officiis abstinere cogantur. Item ex concilio martini papae. Si quis per diversas species vini vel frugis vel cuiuslibet rei emendo et vendendo aliqua incrementa susceperit de gradu suo deiectus alienus habeatur a clero. *Quoniam status ecclesiarum*, to *Causa* XIV, q. 4,

⁶⁴ Di. LXXXVIII, c. 13, *Quid est*. See above, p. 14.

⁶⁵ Rufinus, *Summa*, to *Causa*, XIV, q. 3, pr., 341, 342.

it was slight. Of more significance was that Johannes Faventinus (d. 1220) transcribed the important passage of Rufinus word for word⁷⁰ (as he also did for the contradictory passage of Stephen)⁷¹ and insured for it a wider circulation. On the other hand Sicardus of Cremona (d. 1215) in a manner characteristic of his textbook of Canon law synthesized Rufinus' solution. In a passage centered about the theme of acquisition of profit (*emolumentum*) Sicardus presented the three categories systematically and logically, phrasing them, as was his custom, in the form of a diagram.⁷²

The culmination of the Decretists' doctrine of sale came in the *Summa* of Huguccio (1188–1190). As with the preceding Canonists, Huguccio's conception of the problem was basically founded on the analysis of Rufinus. Unlike the other Canonists, Huguccio went beyond Rufinus and clarified the doctrine by refining certain points and adding new distinctions. Huguccio's analysis of sale is found in a summarizing preface to the section on usury and in two glosses explaining the canon directed against clerics buying and selling (*Causa XIV*, q. 4, c. 3, *Canonum*) and the canon prohibiting speculative sales (*Causa XIV*, q. 4, c. 9, *Quicumque*). His summary consisted of explaining the relationships between usury and various economic contracts such as loans for consumption (*mutuum*), loans for use (*commodatum*), barter, hire, and finally sale.

Huguccio began with the three basic distinctions of Rufinus to which he added refinements. The first category he accepted completely. A sale which is caused by necessity is permitted to both the laity and the clergy. In regards to the clergy Huguccio supported Rufinus against Stephen of Tournai. The clergy are permitted business transactions which arise out of necessity, although Huguccio qualified his judgment by

pr., Paris Bibl. Nat. Lat. 16538, fol. 34^{va}. The identical passage is found in *Cum in tres partes*, Paris Bibl. Nat. Lat. 16540, fol. 34.

⁷⁰ Johannes Faventinus, *Summa*, to *Causa XIV*, q. 3, pr., Paris Bibl. Nat. Lat. 14606, fol. 93^{rb} & ^{va}.

⁷¹ *Ibid.* to *Di. LXXXVIII*, c. 2, *Consequens*, fol. 38^{rb}. In the argument of the role of clerics in business affairs, Johannes seems to have taken sides with Stephen. Not even are they permitted in times of necessity. *Ibid.*, to *Causa XIV*, q. 4, c. 1, *Clerici*, fol. 93^{va}.

⁷²

Emolumentum	ex mutuo	usura est: quidam excipiunt invec- ticiam pecuniam.
	ex empto	ad necessitatem: quilibet quod super est carius sine peccato potest vendere. ad lucrum: si ad lucrum ibique laborat vel expensas facit, licet laicis carius vendere, et clericis aliunde victum non habentibus,

dummodo honesta exerceant officia. ubi vero nec laborant aliquid nec expendunt, talis negotiatio clericis prohibetur, laicis conceditur. usura vero omnibus tam pro aliis quam pro se interdictur. . . . Sicardus of Cremona, *Summa*, to *Causa XIV*, q. 3 and q. 4. Paris Bibl. Nat. Lat. 14996, fol. 86^r & ^v. Sicardus seems to have taken the side of Rufinus, allowing to all clerics commercial transactions caused by necessity.

adding that because of the morally dangerous character of commercial activities, the clergy should attempt to avoid them. If the motivation for buying something is sincerely that of necessity, the thing may be sold at a higher price at a later date without committing sin.⁷³ Likewise, buying cheap and selling dear which results in the improvement of the goods is permitted not only to the laity but also to the clergy. Whatever confusion existed with Rufinus and succeeding Canonists concerning the role of clergy as artisans was cleared up by Huguccio. Clerics may improve goods by their labor and sell them at a higher price under two specific conditions: that their craft is one honorable for clerics and that their ecclesiastical benefices are not sufficient to provide for them so that they have need for supporting themselves through craftsmanship as did the Apostle Paul who was a tent maker. Huguccio went further than Rufinus in defining the nature of such improvements. Not only may improvements be added to goods through craftsmanship and labor, but also through diligent care and custody, as for example, in the raising of horses and other animals. This type of enterprise cannot properly be termed a commercial affair (*negotiatio*) and is permitted to the laity, but is *turpe lucrum* and unlawful for the clergy, although Huguccio complained that this rule was scarcely observed by the clergy of his times.⁷⁴

In the third category Huguccio made the most significant clarifications of the analysis of Rufinus. If one buys cheap and, without making material improvements, sells dear, he is engaged in a commercial affair (*negotiatio*) in the truest sense of the term. Rufinus had absolutely prohibited these enterprises to the clergy but had conceded them to the laity with two qualifica-

⁷³ Item precium. emptione et venditione et hoc licitum est clericis et laicis ad necessitatem suam. Clerici tamen in quantum possunt debent a commertio emptionis et venditionis abstinere, quia ibi non facile deest peccatum. . . . Huguccio, *Summa*, to *Causa XIV*, q. 3, pr., Paris Bibl. Nat. Lat. 15397, fol. 4^{ra}. . . . licet tamen clerico emere vilius et vendere carius, puta indiget re ecclesiastica emit eam satis vili pretio. sed non emit eo intuitu ut vendat. procedente tempore indiget ut eam vendat, vendit eam cariori pretio quam emerit, non peccat in hoc. *Ibid.*, to *Causa XIV*, q. 4, c. 3, *Canonum*, fol. 4^{rb}. *Non necessitate*. nam causa necessitatis et clericis et laicis licet emere et vendere. si ergo clericus vel laicus causa necessitatis emat aliquid, et post carius vendit, non peccat. nec est ibi turpe lucrum. *Ibid.*, to *Causa XIV*, q. 4, c. 9, *Quicumque*, fol. 4^{rb} and 5^{ra}.

⁷⁴ Si vero emitur aliquid ut sit materia in qua exerceatur aliquod artificium et ita aliquid lucri inde acquiratur, hoc licitum est laicis et clericis. dummodo artificium sit honestum clericis nec est hoc negotiari. . . . nec hic acquiritur lucrum ex negotiatione sed ex artificio, quod fecit paulus. unde legitur fuisse scenefactorie artis. et hoc clericis licet quibus beneficia ecclesiastica non sufficiunt. . . . Si vero aliquid emitur ut carius vendatur adhibita melioratione non per artificium sed per curam et diligentem custodiam, ut fit in equis et in his animalibus. laicis licitum est sed non clericis. non tamen dico proprie esse negotiationem, sed turpe lucrum est clericis quod tamen male observant clerici nostri temporis. *Ibid.*, to *Causa XIV*, q. 3, pr., fol. 4^{ra}.

tions. Huguccio accepted completely the rule for the clergy and reinforced the qualifications of Rufinus for the laity. The *turpe lucrum* of Rufinus, which was gained without labor or expenses, Huguccio condemned as solely gratifying one's greed (*ex studiosa cupiditate*). The *honestus questus* permitted by Rufinus to the laity, which was earned through labor and expenses, was justified by Huguccio because it provided for one's own and family needs (*ut provideat sibi et suis*).⁷⁵

By the time of Huguccio the Decretists offered a two-fold analysis of profits derived purely from buying and resale. On the one hand, there was the economic or objective analysis of Rufinus and Sicardus which followed Augustine and justified mercantile profits by the factors of expenses and labor. On the other hand, Huguccio, following the canon *Qualitas*, proposed a moral or subjective analysis which examined the intention of the merchant. Was the merchant transacting business in order to supply his own and his family's needs, or was it to fulfill a calculated greed for wealth? By the end of the twelfth century the Canonists justified merchants' profits on the basis of labor and expenses or on the basis of self-maintenance. It should be noted, however, that the overall motive of the Decretists in offering this two-fold analysis was to distinguish the merchant's profits from usury and *turpe lucrum*, and hence to justify them morally. Although this analysis had obvious implications towards a theory of the just price and a theory of economic value, the Canonists did not explicitly explore this logical relationship. Their primary purpose was to relieve the merchant and his profits from unqualified moral opprobrium.

The progress attained by the Decretists towards the end of the twelfth century is emphasized when Huguccio's conception of buying and selling is compared with the original texts in the *Decretum*. The texts of Gratian were individual pieces of legislation directed against specific evils. From these texts which defined usury and attacked the evils of speculative sale, the Decretists produced a generalized theory embracing the whole realm of buying and selling. Beginning with the specific canons of ancient Canonical and Carolingian legislation they produced the beginnings of an economic

analysis. The development of Canonistic thought can be further judged when one compares the evolution of the roles of the clergy and the laity in economic affairs. The Canonists always maintained basic distinctions of character and function between the clergy and laity, but from an early period the general activity of buying cheap in order to sell dear was generally condemned for both groups. Nevertheless, by the time of Huguccio, of the possible types of selling activity, two were permitted to the clergy: selling because of necessity and selling the products of craftsmanship. Only purely commercial enterprises were forbidden to them. The layman, on the other hand, was permitted to buy cheap in order to sell dear if he was forced by necessity, if he improved the goods or contributed additional expenses, labor, or care, or if he was conducting a commercial enterprise to make an honest living. For him profits not based on labor or expenses or prompted by excessive greed were condemned. The gradual redemption of the profession of the merchant also illustrates the Canonist development. Denounced unequivocally in the *palea* of pseudo-John Chrysostom, he was legally conceded his position by Rufinus, and finally he was permitted to earn his living honorably, although carefully, by Huguccio. Following the suggestion of Augustine's commentary to Psalm 70, the Canon lawyers finally recognized that the purely commercial service of the merchant was legitimate justification for profit. This analysis of economic processes was a logical result of the general Canonistic attempt to apply first principles of moral theology to the practices of everyday life. It was the natural outcome of a group of men who wished to evaluate all of life in terms of Christian ethics, and who wished to relate theory to practice.

4. THE CANONISTS (THE INTERIM AND POST-GREGORIAN PERIODS, 1190-1270)

As evidenced by the vigorous activities of Pope Innocent III and the ambitious program of the Fourth Lateran Council of 1215, Western Europe at the end of the twelfth and the beginning of the thirteenth century witnessed a great outburst of ecclesiastical energy. These fermentations within the Western Church opened a new and revolutionary era for Canon law. As in other realms of ecclesiastical activity, the papacy of this period was the chief initiator and driving power behind these transformations of Canon law. Until the middle of the twelfth century Canon law, best represented by the *Decretum* of Gratian, consisted of collections of laws gathered chiefly from ancient sources. From these varied sources Gratian attempted to fashion a systematic legal text by means of logical synthesis of conflicting elements. In contrast to Gratian's method of jurisprudence by dialectic, the popes after the middle of the twelfth century instituted a new method of ec-

⁷⁵ Si vero emptio fiat causa lucri distinguo si emitur aliquid ut carius vendatur, nullo artificio vel nulla melioratione adhibita hoc quidem negociari est . . . et ita licitum est laicis et non clericis. negotiatio enim laicis concessa est et non clericis . . . nec tamen omnis negotiatio est licita laicis. . . . *Ibid.* to *Causa* XIV, q. 3, pr., fol. 4^{ra}. *Canonum usque studio*. id est studiosa cupiditate vitium notat. nam ex cupiditate neque laicis neque clericis licet emere vel vendere, sed ex necessitate et istis et illis licet. et nota quod emere vel vendere vilius ea intentione ut carius vendat licitum est laico, quia ei concessa est negotiatio. dummodo hoc non faciat ex cupiditate, sed ut provideat sibi et suis. *Ibid.*, to *Causa* XIV, q. 4, c. 3, *Canonum*, fol. 4^{va} & b. *hoc turpe lucrum*. non dicit usuram. sed nonne laicis concessa est negotiatio. sic. sed non quelibet illa enim quesit ex cupiditate eis non est concessa, ut hic. illa quesit ut provideat sibi et suis, eis concessa est et licita. . . . *Ibid.* to *Causa* XIV, q. 4, c. 9, *Quicumque*, fol. 5^{va}.

clesiastical jurisprudence. As sovereign pontiff of the Roman Church the pope had the right to consider cases of ecclesiastical litigation and to issue judgments for their solution in the form of decretals. From the *curiae* of such active popes as Alexander III (1159–1181), Lucius III (1181–1185), Innocent III (1198–1216), and Honorius III (1216–1227) flowed a steady stream of papal decretals which were considered authoritative in ecclesiastical law. By means of these decisions in the case law of the Church the papacy created directly and immediately new principles of ecclesiastical jurisprudence. The papal decretals were not merely capricious and arbitrary judgments but embodied in their precepts the wealth of former and contemporary Canonistic scholarship. They were generally, although not always, issued upon the advice of the Canonists residing at the papal *curia* and recorded in one stroke what many years of Canonist debate had been able to resolve. The new era of papal decretals was founded solidly on the traditions of Canonist scholarship.

The Canonist profession collaborated fully with the papal leadership in remodeling ecclesiastical law. To be distinguished from the earlier Canonists or Decretists who concentrated on the *Decretum* of Gratian, the Canonists of the new era have often been called Decretalists. As soon as the new decretals were issued the Decretalists began assembling them into collections. At first these collections were of a private and sporadic nature, but gradually a systematic pattern began to emerge in a series of important collections known as the *Quinque compilationes antiquae* (ca. 1191–1226) which assembled the papal decretals from the time of Gratian through that of Honorius III. The progress of these preliminary compilations reached a climax when from 1230 to 1234 Raymond of Peñafort (d. 1275), Chaplain to Pope Gregory IX (1227–1241), made a definitive collection which combined the previous attempts. In 1234 Pope Gregory IX officially promulgated these *Decretales* with a bull which nullified all former collections since the *Decretum* and established the new compilation as the sole authority for Canonical material between 1140 and 1234. Along with the *Decretum* the *Decretales* of Gregory IX constituted another milestone in the development of the law of the Church.

Not only did the Decretalists assist in collecting the new papal decretals but they also wrote glosses and apparatus to their compilations. By these means they attempted to harmonize the new decisions with the older established principles of Canon law and to modernize the science of ecclesiastical jurisprudence. These writings of the Decretalists may be divided at 1234 into two general periods: the Interim period (ca. 1190–1234), when the Decretalists worked primarily on the *Quinque compilationes antiquae* and the post-Gregorian period (1234 and after) when they concentrated on the *Decretales* of Gregory IX. The Interim period may be

characterized as an era of legislation, experimentation, and innovation, when new elements were fused into the existing law and the whole body of Canon law underwent revolutionary changes. During this period, for example, Roman law concepts were introduced into the Canonists' theories of sale and price. The post-Gregorian era, on the other hand, was one of consolidation, when the new elements of the papal decretals were absorbed into a mature system of ecclesiastical jurisprudence. During this time the Canonist analysis of sale achieved fullest expression in the writings of Cardinal Hostiensis (d. 1271). The work of Hostiensis stands as the Canonist counterpart to the writings of Accursius and Odofredus in Roman law and the *Summa theologica* of Thomas Aquinas in theology. The theories of the post-Gregorian Canonists on the just price, therefore, form the Canonist context for those of the High Scholastics.

I. LAESIO ENORMIS AND THE ROMAN LAW OF SALE

Never was Canon law immune from the influences of Roman law. From the twelfth century the creative center of both legal systems was Bologna, where Canonists and Romanists were neighbors in time and space. Even during the twelfth century when the attention of the Canonists was mainly absorbed in the study of Gratian's *Decretum*, the Decretists showed certain evidences of the influence of Roman law. In this early period the master-pupil relationships between the two groups are not quite clear, but it is possible that Rufinus and Stephen of Tournai were students of Bulargus, and Johannes Bassianus appears to be one of the first teachers of both Roman and Canon law. Among the Decretalists the relationships between the Canonists and the Romanists are more evident. During the Interim period, for example, Johannes Teutonicus (d. 1246) and Tancredus (d. ca. 1235) studied Roman law under Azo, and Vincentius Hispanus (d. 1248) heard lectures in civil law from Accursius. Among the Decretalists after Gregory IX, Goffredus of Trani (d. 1245) and Innocent IV (d. 1254) were experts in Roman law, and Hostiensis was celebrated as *iuris utrius monarcha*.

This relationship between Romanist and Canonist studies resulted in the significant influence of Roman law on Canon law and *vice versa*. One phenomenon of importance in the Interim period was the steady penetration of Roman law into Canonist doctrine and especially into the Decretalists' theories of sale. Roman law had no need for a *sub rosa* entry into the ecclesiastical precincts. It penetrated the Canon law with the full cognizance of the authorities of the Church. From the beginning Gratian announced the supplementary role of Roman law in the Church. Roman law could be used in ecclesiastical affairs where Scripture and

Canon law did not contradict its solutions.¹ The Decretists of the twelfth century followed their master almost unanimously in this opinion,² and their occasional references to Roman law practices in sale indicate their acceptance of this general rule.³ During the Interim period, when the penetration of Roman law practices increased greatly, Pope Lucius III gave official expression to the private opinion of Gratian in the bull *Intelleximus*.⁴ Roman law was permitted to speak where Canon law was silent.

Prior to the first collections of papal decretals of the Interim period the doctrines of sale of Roman law were not unknown to the Canonists. The early Decretists of the twelfth century, for example, cited the formula of *laesio enormis* on several occasions.⁵ These early references of the Canonists were only incidental and sporadic in nature. Since the main concentration of the Decretists was on the *Decretum*, transactions of sale were viewed chiefly in connection with usury, and the principles of Roman law occupied a secondary position. With the beginning of the vigorous production of papal decretals towards the end of the twelfth century, however, came the significant introduction of the Roman law of sale into the thinking of the Canonists. By means of decretals, the popes injected the legal device of *laesio enormis* into the system of Canon law. Once entrance was gained by *laesio enormis*, the whole system of sale of Roman law naturally followed.

Two popes were especially important for their contributions to the theories of sale of Canon law in general and to the introduction of *laesio enormis* in particular. It is indeed not strange that both these men in preparation for their positions were trained in the best traditions of the science of Canon law. Roland Bandinelli composed a *summa* on the *Decretum* of Gratian. Although this early work had little importance for the doctrine of sale, Roland, later as Pope Alexander III, made some significant contributions to the Canonist theories of sale through his decretals. Likewise, the forceful and energetic Innocent III received his training in Canon law from Huguccio. Firmly rooted in the principles of the *Decretum* these popes felt sufficiently capable to supplement Canon law with infusions from Roman law.

Three decretals issued from the *curiae* of Popes Alexander III and Innocent III permanently introduced

the Roman law doctrine of *laesio enormis* into the body of Canon law. The first is found in a letter issued from Alexander III to the Bishop of Arras sometime between 1159 and 1181. This decretal, known as *Quum dilecti*, concerned an adjudication of a case of *laesio enormis*, and entered the body of Canon law in the *Compilatio prima* of Bernard Balbi of Pavia (d. 1213).⁶ Without permission from their bishop, certain canons of Beauvais sold for ten pounds a piece of wooded land, valued at forty marks, to the Abbot and monks of the Cistercian abbey of Chaalis in the diocese of Senlis.⁷ On petition of the canons, the case went before the court of the Bishop of Thérouanne (the ancient diocese of the Morini) and later to the Dean of Rheims. On the basis of *laesio enormis* the Dean decided that, since the land was sold for less than one-half the just price, the sale did not hold and the land should be returned to the canons. The case was finally appealed to Rome, and Pope Alexander III reversed the decision of the Dean and returned the land to the monks. Excepting the two factors of original alienation without consent of the Bishop and gross deception of price, the Pope decreed that the Dean's judgment was not according to law. Under the provisions of *laesio enormis*, a sale was not automatically invalidated because of gross inequity of price, but rather the buyer had the choice of supplying the just price or rescinding the sale. Since in the Dean's court the monks did not have this choice, the judgment was contrary to law and declared void. The noteworthy feature of this case is that as early as the pontificate of Alexander III the remedies of the Roman law doctrine of *laesio enormis* were applied in the ecclesiastical courts. At this time the papal *curia* not only recognized a Roman law device of sale, but also was capable of enforcing this legal instrument according to the strictest principles of contemporary Roman jurisprudence. The decretal *Quum dilecti* indicates clearly the bold entry of *laesio enormis* into the ecclesiastical legal system.

A second decretal, although not dealing directly with the question of sale, concerned the problem of gross injury and was utilized by later Canonists in their discussions of *laesio enormis*. During the pontificate of Innocent III, a Tuscan monastery, forced by the burden of great debts, alienated in fief a certain villa to a layman B, on the condition that he undertake debts valuing eighty pounds for which the villa was mortgaged. When the layman B in administering the fief of the villa actually collected more than eighty pounds in the first year's revenue, and in later years even more, the monks appealed the case to the papal *curia*. In the

¹ Gratian, *Di. X*, *Dictum* post c. 6. *Ibid.*, *Causa XV*, q. 3, *dictum* post c. 4.

² Cf. Van Hove, A., *Prolegomena*, 461, n. 3, Malines, H. Dessain, 1945. For the whole subject of the reception of Roman law, cf. *ibid.*, 461-467.

³ See below, p. 46.

⁴ X: V, 32, c. 1, *Intelleximus*.

⁵ Johannes Faventinus, *Summa*, to *Causa XXIX*, q. 1, pr., Paris Bibl. Nat. Lat. 14606, fol. 140; Simon of Bisignano, *Summa*, to *Causa X*, q. 2, c. 2, *Hoc ius*, Paris Bibl. Nat. Lat. 3934A, fol. 71; Sicardus of Cremona, *Summa*, to *Causa XIV*, q. 5, Paris Bibl. Nat. Lat. 14996, fol. 87; Huguccio, *Summa*, to *Causa X*, q. 2, c. 2, *Hoc ius*, Paris Bibl. Nat. Lat. 15396, fol. 159.

⁶ *Comp. I*: III, 15, c. 4, *Quum dilecti*. The text is found in X: III, 17, c. 3, *Quum dilecti*. Cf. Jaffé-Wattenbach, *Regesta*, 13749.

⁷ The text of the decretal employs the name *Carilocus*. It undoubtedly refers to the abbey of *Carolilocus* or Chaalis. For the historical background of the decretal see *Gallia christiana* 10: 1509, Paris, 1751.

decretal *Ad nostram noueritis* of 29 March, 1206, Innocent III decreed that the monastery had suffered gross injury in the transaction and demanded that layman B return the fief under pain of ecclesiastical censure. This rescript, which was included in the *Compilatio tertia* (1210) of Peter Beneventanus,⁸ illustrates the broad ramifications of *laesio enormis* in Church law.

The *cause célèbre* of *laesio enormis* in Canon law occurred a year later in the pontificate of Innocent III. The Abbot and convent of St. Martin de Monte near Viterbo sold some tenement holdings (*accasamenta*) and lands to one Forteguerra and one Raynucius, citizens of Viterbo. Later the monks discovered that they had suffered loss in the sale beyond one-half the just price, and petitioned for the remedies of *laesio enormis*. The litigation passed through the secular courts of Viterbo and the ecclesiastical courts until an appeal finally arrived at Rome. In a letter of 30 October, 1207, Innocent III corrected the errors of the secular and ecclesiastical courts and decided the question in favor of the convent purely on the grounds of *laesio enormis*. The monks had been deceived in the sale beyond one-half the just price. The two citizens had the alternatives of either rescinding the sale or paying the just price.⁹ A month later a second letter was issued from the papal *curia* concerning the case. This decretal of 27 November, 1207, known as *Quum causa*, restated the facts concerning *laesio enormis* of the first letter and then went on to elaborate the method of proof. In the former case the monastery had produced witnesses to prove sufficiently that it had been injured beyond one-half the just price, but these witnesses had not specified how much that injury had been. This proof was sufficient if the buyers elected to rescind the sale and return the lands. If, however, the buyers wished to retain the land and pay the just price, the monastery must produce the same witnesses to prove how much was the injury and what was the real value of the lands. It was this second letter, *Quum causa*, which was placed in the *Compilatio tertia* of Peter Beneventanus.¹⁰ Through the decretal *Quum causa* Innocent III introduced into the body of Canon law without modifying factors the full conditions of *laesio enormis* as understood by the contemporary Romanists.

The *Decretales* of Gregory IX incorporated with little modification these basic papal statements concerning *laesio enormis*. The only change performed by the

editing of Raymond of Peñafort was the dividing of the decretal *Quum causa* into two parts and placing the section concerning witnesses under the appropriate title and the remainder under the title of buying and selling. The rest of the papal legislation was arranged under the titles of *de rebus ecclesiae alienandis vel non* and *de emptione et venditione*.¹¹

By direct statement the popes welded the doctrine of *laesio enormis* firmly to the system of Canon law. Once the three decretals became a part of the semi-official or official body of Church law, the Canonists began writing glosses, commentaries and *summae* to these rescripts in an effort to interpret, harmonize, and develop their doctrines. The manner in which the Canonists received these decretals indicates that the popes had not decided unadvisably. The doctrine of *laesio enormis* was accepted essentially by the Decretalists, and occasionally they even participated in some of the current Romanists' debates, which defined certain aspects of the theory. As illustrated by the practical manual of Bonaguida of Arezzo (*ca.* 1250) for the use of ecclesiastical lawyers, nothing could better demonstrate the harmony between the Canonists and Romanists of Bologna than the acceptance by the Canonists of the Roman law theory of *laesio enormis*.¹²

Since the standard features of the doctrine were exposed fully in the three papal decretals, and since this exposition corresponded closely to the development attained by the contemporary Romanists, the Canonists felt little need to elaborate on the fundamental doctrine in their glosses and commentaries. Where they do refer to the essential elements in their more independent writings, such as the *summae*, they are in perfect agreement with the Romanist theories.¹³ One difference, however, did distinguish the Canonists' treatment of the subject from the Romanists'. At a time contemporary with and subsequent to that of Azo, the Canonists paid little attention to the extension of the provisions of *laesio enormis* to the buyer. Following the guidance of the three papal decretals, they almost invariably referred to the doctrine exclusively in connection with an injured seller. Occasionally references were made to the buyer, but they were always scanty and of little detail.¹⁴

¹¹ See above the individual decretals for the exact references.

¹² Bonaguida of Arezzo, *Summa introductoria*, Part. II, Tit. 16, in Wunderlich, *Anecdota*, 209, 210.

¹³ Bernard Balbi of Pavia, *Summa decretalium*, Lib. III, Tit. 15, p. 82. Illud in summa nota quod si venditor deceptus sit ultra dimidium iusti precii. In potestate erit emptoris. suplere iustum precium. vel discedere ab emptione. Damasus, *Summa*, "de emptione et venditione," Paris Bibl. Nat. Lat. 14320, fol. 160^b and 14609, fol. 117.

¹⁴ Bernard Balbi of Pavia, *Summa decretalium*, Lib. III, Tit. 15, p. 82. Quid si ciues sint decepti ultra dimidium in pretia agant. ut refundatur eis de pretio. ut solvatur contractus. Vincentius, *Apparatus*, to *deceptum*: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 14611, fol. 93^b. In the example of *Quum causa* the *ciues* were the buyers. An example even occurs in the era of the Decretists in Johannes Faventinus:

⁸ The original letter is found in Innocent III, *Regesta*, Lib. IX, c. 56, in P.L. 215: 868, 869; *Comp. III*: III, 13, c. 2, *Ad nostram noueritis*; and X: III, 13, c. 11, *Ad nostram noueritis*. Cf. Potthast, *Regesta*, 2729.

⁹ Innocent III, *Regesta*, Lib. X, c. 145, in P.L. 215: 1243, 1244. Cf. Potthast, *Regesta*, 3208.

¹⁰ The fullest version of the text is found in Innocent III, *Regesta* Lib. X, c. 162, P.L. 215: 1255, 1256. An abbreviation of the original was included in *Comp. III*: III, 14, c. 2, *Quum causa*. Finally, in the *Decretals* of Gregory IX, the letter was cut into two pieces: III, 17, c. 6, *Quum causa*, and II, 20, c. 42, *Quum causa*.

The Canonists waited until after the *Decretales* of Gregory IX in 1234 to participate in the controversy over computation of gross injury to the buyer, which was waging currently among the Roman lawyers. As has been noted, the Romanists Martinus and Placentinus maintained that the limits of protection for the buyer should be the double of the just price, but Azo contended that it should be the just price extended to its half.¹⁵ The *Glossa ordinaria* of Bernard Botone of Parma (ca. 1241-1266) appears to have been the first Canonist treatise to record the debate, and Bernard sided completely with Azo.¹⁶ Hostiensis also supported Azo in his *Summa aurea*,¹⁷ and later in his *Commentaria* provided a new argument against the "double" theory. According to the "double" theory, the buyer cannot invoke the provisions of *laesio enormis* until the price exceeds the double of the just price. Hostiensis argued that in this case the buyer was not being injured beyond one-half the just price but beyond the whole just price. For this theory to be valid it must apply analogously to the seller. Just as one discovers the limits of *laesio enormis* for the buyer by adding the whole just price to the original just price, so must one subtract the whole just price from the original just price for the seller. The result is zero, or no price at all, and this is legally impossible, since no sale can be contracted without a price.¹⁸ The general problem of the computation of the limits of *laesio enormis* for the seller was almost unanimously agreed as being any fraction below the exact one-half of the just price. An exception to this rule was mentioned by Innocent IV, when he noted an opinion of the limit being slightly above one-half the just price.¹⁹

As to minor questions arising out of the mechanism of *laesio enormis*, the early Decretalists participated in the discussion of the problem of goods perishing in the buyers' possession. Damasus (ca. 1215) quoted both sides of the arguments already rehearsed by the Roman lawyers and agreed with the position of Azo that the buyer in this case was under no obligation to pay the just price.²⁰ Later in the post-Gregorian period, Bartholomew of Brescia (d. 1258) treated the problem

in his *Questiones dominicales et veneriales* and essentially reproduced the former solution of Damasus.²¹

Of greater significance was the question of legal procedure for enforcing *laesio enormis*. The original text of Roman law seemed to indicate that it was to be enforced by an *officium iudicis*, through *restitutio in integrum*, which was valid only for four years, and this position was held by such Romanists as Rogerius and Placentinus. The Decretalists of the Interim period, Vincentius Hispanus, Johannes Teutonicus, and Tancredus sided with Johannes Bassianus, Azo, and others who maintained that *laesio enormis* was to be enforced by an *actio* (or *condictio*) *ex eo contractu*, which had the advantage of lasting perpetually or thirty years under Roman law.²² In the later period Bernard Botone of Parma reproduced with approval the gloss of Vincentius Hispanus and Johannes Teutonicus.²³ In the post-Gregorian period, however, certain Canonists appeared to be more disposed to using the device of *restitutio in integrum* for remedying injury done to churches in certain cases. Churches were often identified with the legal status of minors and hence could qualify for appropriate protection.²⁴ Apparently influenced by this tendency, Innocent IV listed the two possibilities of *actio ex contractu* and *officium iudicis* without rejecting either.²⁵ Hostiensis reflected the prevalent view of his contemporaries in preferring the *actio ex contractu*.²⁶ A final question arising out of the legal procedure for enforcing *laesio enormis* was the problem of renouncing the remedies by oath. The question, as we have seen, originated from the medie-

²¹ Bartholomew of Brescia, *Questiones dominicales et veneriales*, Paris Bibl. Nat. Lat. 3972, fol. 90, and 3969, fol. 63.

²² Sed quo iure agetur ad rescindendum contractum talem. dicunt quidam quod iudicis officio. quia lex dicit. quod actione ex empto non potest agi ad rescindendum contractum . . . secundum hoc agetur tantum usque quadriennium. quia usque ad aliud tempus compecit restitutio in integrum . . . alii dicunt. quia conditione ex illa lege (C. de rescindende venditione, lex ii) et secundum hoc usque ad .xxx. annos. quia omnes condiciones cum sint personales perpetue sunt. credo quod agetur actione ex contractu ex vendito. scilicet ad suplundum precium alternative vel rescindi vendicionem. nec est mirum si per actionem ex contractu agitur ut rescindatur a contractu . . . quia in contractibus bone fidei multa veniunt. de quibus nec est dictum nec cogitatum. Johannes Teutonicus, *Apparatus*, to *memoratas*: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3930, fol. 164^{vb}. This quotation is an expansion upon a version of Vincentius Hispanus, Paris Bibl. Nat. Lat. 14611, fol. 93^{vb}. Tancredus includes the version of Johannes in his *Glossa ordinaria*, Paris Bibl. Nat. Lat. 12452, fol. 73^{vb}. For the Romanist controversy, see above, p. 24.

²³ Bernard Botone of Parma, *Glossa ordinaria*, to *restituerent*: X: III, 17, c. 6, *Quum causa*.

²⁴ Goffredus of Trani, *Summa III*, 17, fol. 128^{vb}. This opinion is reproduced verbally in Monaldus, *Summa perutilis*, v^o de *emptione*, fol. 42. Bernard Botone of Parma, *Glossa ordinaria*, to *restituerent*: X: III, 17, c. 6, *Quum causa*. This gloss is assigned to Johannes Teutonicus.

²⁵ Innocent IV, *Apparatus*, to *restituerent*: X: III, 17, c. 6, *Quum causa*, fol. 255.

²⁶ Hostiensis, *Summa aurea III*, 17, par. 7, p. 750.

Non potest venditionem rescindere. nisi forte minus duplo emisset quam iustum esse pretium deberet. Summa, to *Causa XIX*, q. 1, pr., Paris Bibl. Nat. Lat. 14606, fol. 140^{ra}.

¹⁵ See above, p. 23.

¹⁶ Bernard Botone of Parma, *Glossa ordinaria*, to *dimidiam*: X: III, 17, c. 6, *Quum causa*.

¹⁷ Hostiensis, *Summa aurea III*, 17, par. 7, p. 749.

¹⁸ Hostiensis, *Commentaria*, to *dimidiam*: X: III, 17, c. 6, *Quum causa*, 3: fol. 58^{vb}.

¹⁹ Innocent IV, *Apparatus*, to X: III, 17, c. 6, *Quum causa*, p. 255. Cf. also the Venetian editions of 1570 and 1578.

²⁰ Damasus, *Questiones*, "De emptione et venditione," Paris Bibl. Nat. Lat. 14320, fol. 186^{vb}. This passage is merely an expansion of a quotation Damasus has borrowed from Laurentius. Damasus, *Apparatus*, to *Comp. I*: III, 15, c. 4, *Quum dilecti*, Paris Bibl. Nat. Lat. 3930, fol. 26. For the Romanist discussion, see above, p. 23.

val practices of Roman law from the end of the twelfth century,²⁷ but it did not receive the attention of the Canonists until the middle of the thirteenth century. In the *Glossa ordinaria* to the *Decretales* of Gregory IX, Bernard Botone of Parma recognized the device of the oath, and accepted the position of Azo that this oath precluded the seller from seeking the remedies of *laesio enormis*.²⁸

As has been demonstrated, the device of *laesio enormis* was a remedy of Roman law for unusual situations in determining prices. The usual situation was simply general freedom of buyers and sellers to set their own prices in individual bargains. By accepting the specific device of *laesio enormis* the Canonists signified their assent to the general theory of Roman law for determining prices. The specific remedy and the general theory go hand in hand. To accept the former is to imply the latter. The general acceptance by the Canonists of the Roman law principle of freedom of bargaining is amply indicated by numerous references to the traditional formula of Roman law: *licet contrahentibus invicem se naturaliter circumvenire*. The Decretists of both the twelfth and thirteenth centuries appended the formula to various parts of their commentaries,²⁹ and the phrase was widely current in the discussions of the Decretalists.³⁰ More frequently perhaps than their Romanist colleagues, the Decretalists warned that moderate mistakes in determining prices could not be remedied legally. Errors of bargaining within the whole range from one-half the just price to the just price itself were outside the protection of law.³¹

²⁷ For the Romanist discussion, see above p. 24 ff.

²⁸ Bernard Botone of Parma, *Glossa ordinaria*, to *restituerent*: X: III, 17, c. 6, *Quum causa*.

²⁹ An example from the twelfth century comes from Sicardus of Cremona: Si non compeit repetitio licite possunt expendi ut in medico advocato officiali et domino non opprimente sed oportune dativas a rusticis extorquente et in contractibus circumveniente quia licet contrahentes se invicem decipere nisi circumvenierit ultra dimidium iusti pretii. *Summa*, to *Causa XIV*, q. 5, Paris Bibl. Nat. Lat. 14996, fol. 87^r. From the thirteenth century: nam contrahentibus naturale est decipere. *Apparatus Ius Naturale*, to *intervenire*: *De poen.* V, c. 2, *Qualitas*, Paris Bibl. Nat. Lat. 15393, fol. 261. nam naturale est quod contrahentes invicem se decipiant. Laurentius Hispanus, *Apparatus*, to *non intervenire*: *De poen.* V, c. 2, *Qualitas*, Paris Bibl. Nat. Lat. 3903, fol. 252, and 14317, fol. 265. For further examples from the Decretists see below, p. 55, n. 107.

³⁰ It would be impossible to cite all the examples of the formula. During the Interim Period an example may be cited from Tancredus: quamvis naturaliter liceat contrahentibus circumvenire sese . . . tamen nimia deceptio a iure corrigitur. *Apparatus*, to *deceptionis*: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3931A, fol. 185, and 12452, fol. 74. In the post-Gregorian period Vincentius Hispanus reproduced this gloss, *Apparatus*, to *supplerunt*: X: III, 17, c. 6, *Quum causa*, Paris Bibl. Nat. Lat. 3967, fol. 130, and 3968, fol. 108. For other examples from Decretalists see below pp. 55-57.

³¹ For example: . . . non potest dici clericis lesum ultra dimidium iusti pretii, quia tunc minaretur legibus istis . . . sed si citra lesum est non debet rescindi. cum liceat contrahentibus naturaliter se circumvenire. Laurentius, *Apparatus*, to *dispensandum*: *Comp. III*: III, 13, c. 2, *Ad nostram noveritis*, Paris

In essence the Canonists adopted as their own the Roman law theory of freedom of bargaining within the limits of *laesio enormis*.

By the second half of the thirteenth century the penetration of the Roman law of sale into Canon law was well advanced. The specific device of *laesio enormis* and the theory of free bargaining were merely illustrative cases of this general movement. During the twelfth century the Canonists were largely absorbed with the text of the *Decretum* and gave the theories of sale of Roman law only passing acknowledgment, but with the growing importance of the papal decretals, came the increasing influence of Roman law. Whenever there was opportunity, the Decretalists of the thirteenth century demonstrated their technical proficiency in the intricacies of the Roman law of sale. These opportunities were most available in the *summae in titulos decretalium*, where the Canonist was not obliged to discuss individual legal texts, but to give comprehensive treatments of the subject of the title. Under the title of *de emptione et venditione* (III, 17) several Decretalists of the Interim Period such as Bernard Balbi of Pavia and Damasus, discussed the problems of sale from the point of view of Roman law.³² In the era after Gregory IX a great number of the Decretalists including: Goffredus of Trani, Bernard Botone of Parma, Hostiensis, and Monaldus (before 1274), wrote titles which were little less than Romanist treatises on the legal problems of sale.³³ Not as an original contribution, but as a mirror of its times, the *Speculum doctrinale* of Vincent of Beauvais (d. 1264) reflected faithfully the legal development of the mid-thirteenth century when it discussed the subject of buying and selling largely as a problem of Roman law.³⁴

II. USURY AND THE CANON LAW OF SALE

The Decretists of the twelfth century paid only slight attention to the Romanists' theories of sale. Their chief concern was to develop in relation to the general doctrine of usury a theory of sale which was based on an ethical analysis of profits. On the other hand, the Decretalists of the thirteenth century were largely influenced by the penetration of theories of

Bibl. Nat. Lat. 3932, fol. 160^{vb}. Hoc ideo dicit quia pro levi dampno non competit restitutio. Johannes Teutonicus, *Apparatus*, to *enormiter*: *Comp. III*: III, 13, c. 2, *Ad nostram noveritis*, Paris Bibl. Nat. Lat. 3930, fol. 164. Cf. the version of Bernard Botone of Parma, *Glossa ordinaria*, to *enorme*: X: III, 13, c. 11, *Ad nostram noveritis*.

³² Bernard Balbi of Pavia, *Summa decretalium* III, 15 and Damasus, *Summa*, de emptione et venditione. For examples and references see above, p. 44, n. 13.

³³ Goffredus of Trani, *Summa*, fol. 128; Bernard Botone of Parma, *Summa titulorum*, Paris Bibl. Nat. Lat. 3972, fol. 61, and 4053, fol. 93; Hostiensis, *Summa aurea*, p. 742 ff.; and Monaldus, *Summa perutilis*, v^o de emptione, fol. 42, and v^o de venditione, fol. 273, 274.

³⁴ Vincent of Beauvais, *Speculum doctrinale* VIII, 139-141, p. 655-657.

Roman law into Canon law. During this era of "Romanization" of Canon law, what was the fate of the former Decretists' analysis of sale? Did it survive the influx of Roman law?

The Canonist writings of the twelfth century were called *summae*, and were at the same time commentaries to the text of the law and systematic treatises of doctrine. After Huguccio no further *summae* of great importance were composed to the *Decretum*. The apparatus of the new period, such as *Ecce vicit leo* (1202-1210), *Ius naturale* (1210-1215), Laurentius Hispanus (d. 1248), Johannes Teutonicus, and Bartholomew of Brescia, neglected the systematic function of the old *summae* and concentrated solely on glossing the text. As such, their method of presenting doctrine was somewhat fragmentary. Because of the special nature of the writings based on the *Decretum* of the thirteenth century, the perpetuation of the tradition of the twelfth century Decretists was somewhat fragmentary. Nevertheless, if all of the glosses and comments relative to the subject of usury and sale are pieced together, one discovers that the older Canonist analysis of sale remained intact in its essential elements.

The final achievement of the Decretists' conception of sale in the twelfth century was presented by the *Summa* of Huguccio. His analysis of the buying and selling process can likewise be reassembled from the writings of the following period. In a first category, Huguccio permitted buying cheap and selling dear because of necessity or expediency. Raymond of Peñafort echoed this idea by saying that if anyone bought something because of necessity, and later found no need for it, he could resell it for a higher price if it was sold openly on the market.³⁵ Similarly, the *Apparatus Ius naturale* stated that if a cleric bought something and later sold it because of expediency, he could sell it at a higher price without sinning, as long as he sold it for the just price and without fraud.³⁶ In both of these cases the market price or the just price was the determining factor in justifying the resale. Secondly, Huguccio permitted an increased price for goods to which improvements had been added through expenses, labor or care. This category was the general enterprise of *artificium* or craftsmanship. That craftsmanship was a legitimate activity for the laity was generally and tacitly assumed by the later Canonists and little mention is made of it. On the other hand, the question of clergy participating in the activity of *artificium* occupied a large proportion of Canonist discussions of sale. All assumed that the clergy could supply their own material needs by means of various

skills.³⁷ The cleric was permitted to make a profit through craftsmanship in order to maintain himself. Johannes Teutonicus, for example, defended his right to buy raw materials and later sell finished goods for gain.³⁸ Especially were the Canonists anxious to protect the clerical right to make books and devotional objects to sell them at a profit. Almost every Decretist of the period mentioned one or the other of these crafts in his discussions of lawful enterprises for the clergy.³⁹ As to the practice of buying young animals, such as colts, and raising them until they were horses to be sold on the market for a profit, Huguccio condemned it as unlawful for the clergy, although he complained that few clerics of his day obeyed the rule. In the following period Laurentius Hispanus voiced doubts about the activity saying that it was only permissible for the clergy if some definite work of improvement had been performed on the animals.⁴⁰ The rest of the Canonists, however, had no pangs of conscience about the matter and included it unequivocally among those activities lawfully remunerative to the clergy.⁴¹ Apparently the practice of the day had overcome the scruples of Huguccio.

As ominous warnings, two ecclesiastical formulas overshadowed the profession of medieval merchants. Even in the middle of the thirteenth century the canon *Quicumque*,⁴² with its rubric, "He who buys cheap in order to sell dear, seeks shameful profit," and the canon, *Qualitas*⁴³ with its admonition, "It is difficult among buyers and sellers not to fall into sin," remained to be

³⁷ Raymond of Peñafort, *Summa* II, 8, par. 2, p. 246. Also in Vincent of Beauvais, *Speculum doctrinale* X, 127, p. 974.

³⁸ licitum tamen est clericis emere aliquam rudem materiam. et inde artificium aliquod facere. si eis sua non sufficiunt . . . et tunc non acquiritur lucrum ex negotiatione. sed ex artificio. talia enim licita erant apostolis. Johannes Teutonicus, *Glossa ordinaria*, to quod autem: Causa XIV, q. 3, c. 1, *Quod autem*, Paris Bibl. Nat. Lat. 14317, fol. 156^{ra}. Also in Bartholomew of Brescia, *Glossa ordinaria*, to quod autem: Causa XIV, q. 3, pr.

³⁹ Bernard Balbi of Pavia, *Summa decretalium* V, 15, p. 235. . . . sed clericus non licet nisi rem emptam specifice ut pote faciendi scrinium de tabulis quas emit vel alio artificio melioret vel opera. Laurentius Hispanus, *Apparatus*, to Causa XIV, q. 3, or 4(?), Paris Bibl. Nat. Lat. 15393, fol. 150^{ra}. sed in rudi materia potest emere cornum et cartas et inde faceret sutelares et libros . . . nec est hoc negotiatio sed artificium. Johannes Teutonicus, *Glossa ordinaria*, to vendendi: Causa XIV, q. 4, c. 2, *Canonum*, Paris Bibl. Nat. Lat. 14317, fol. 156^{rb}. Raymond of Peñafort, *Summa*, II, 8, par. 2, p. 246. Also in Vincent of Beauvais, *Speculum Doctrinale* X, 127, p. 974.

⁴⁰ Non credo eis licere pullam educare et postea equum factum vendere. nisi adhibita aliqua opera meliorationis. quo casu intelligetur questus ex artificio. Laurentius Hispanus, *Apparatus*, to Causa XIV, q. 3 or 4(?), Paris Bibl. Nat. Lat. 15393, fol. 150^{ra}.

⁴¹ Bernard Balbi of Pavia, *Summa decretalium* V, 15, p. 235. Raymond of Peñafort, *Summa* II, 8, par. 2, p. 246. Also in Vincent of Beauvais, *op. cit.* William of Rennes, *Glossa to peccant: Summa Raymundi* II, 7, par. 9, p. 235. This gloss was reproduced in Monaldus, *Summa perutilis*, v^o de usura, fol. 270.

⁴² Causa XIV, q. 4, c. 9, *Quicumque*.

⁴³ De poen. V, c. 2, *Qualitas*.

³⁵ Raymond of Peñafort, *Summa* II, 7, par. 9, p. 236. Also in Vincent of Beauvais, *Speculum doctrinale* X, 112, p. 964.

³⁶ Si enim rem emisset clericus pro utilitate sua, et eam postea vendere et expediret. si carius venderet quam emit non peccaret, dummodo iusto pretio et sine fraude. *Apparatus Ius Naturale*, to studio: Causa XIV, q. 4, c. 3, *Canonum*, Paris Bibl. Nat. Lat. 15393, fol. 150^{rb}.

reinterpreted by those Canonists who attempted to justify merchants' profits derived from purely commercial activities. The *Poenitentiale* of Johannes of Deo (fl. 1247–1253) and the *Cui mercator* of Hostiensis, which was largely influenced by Johannes, included these formulas in their sections of penitential advice to merchants.⁴⁴ Bernard Botone of Parma, Bartholomew of Brescia and Monaldus softened somewhat the universal condemnations of these canons by stating that *turpe lucrum* probably applied more to the clergy than to the laity.⁴⁵ The Canonists were universally agreed that purely mercantile activities were forbidden to the clergy.⁴⁶ Although some traces of the stigma of *turpe lucrum* remained, the activities of buying and selling were generally permitted to the laity under special qualifying conditions.⁴⁷

The qualifications for justifying purely mercantile profit were clearly formulated by the Decretists of the twelfth century as illustrated by the final category of Huguccio's analysis: Laymen may buy cheap and sell dear if they use the profits to maintain themselves in an honest living. If, however, they conduct these enterprises avariciously for the purpose of profiteering, the activities are condemned. In the Interim period these two qualifications were briefly restated in the *Apparatus* of Laurentius Hispanus.⁴⁸ Raymond of Peñafort⁴⁹

⁴⁴ *De poenitentia mercatorum et omnium aliarum arcium et cui debeant confiteri*. . . . Item emunt vilius et vendunt carius turpe lucrum est si vendunt specie non mutata. . . . Dicit enim canonum quod inter vendentes et ementes difficile est non intervenire peccatum. Johannes de Deo, *Liber poenitentiarum*, Lib. VI, Tit. 9, Paris Bibl. Nat. Lat. 14703, fol. 110^{rb}. Hostiensis, *Summa aurea* V, de poen. et remis., cui mercator, p. 1424.

⁴⁵ Item nota quod emere vilius et vendere carius turpe lucrum est et ideo clericis prohibetur. Bernard Botone of Parma, *Summa titulorum*, to X: V, 19, Paris Bibl. Nat. Lat. 3972, fol. 69, and 4035, fol. 113. Bartholomew of Brescia, *Glossa ordinaria*, to Causa XIV, q. 4, c. 9, *Quicumque*. Reproduced also in Peter of Salins, *Lectura*, Paris Bibl. Nat. Lat. 3917, fol. 134. Monaldus, *Summa perutilis*, v^o de usura, fol. 290.

⁴⁶ Bernard Balbi of Pavia, *Summa decretalium* III, 37, p. 129. Clerici tamen in quantum possunt debent abstinere emptione et venditione. quia non facile sit sine peccato. Johannes Teutonicus, *Glossa ordinaria*, to quod autem: Causa XIV, q. 3, c. 1, *Quod autem*. Paris Bibl. Nat. Lat. 14317, fol. 156. Raymond of Peñafort, *Summa* II, 8, par. 2, p. 246. Bartholomew of Brescia, *Glossa ordinaria*, to Causa XIV, q. 4, c. 3, *Canonum*. This gloss was reproduced by Peter of Salins, *Lectura*, Paris Bibl. Nat. Lat. 3917, fol. 133.

⁴⁷ . . . emptio et venditio . . . permutatio . . . locatio et conductio . . . omnes isti contractus tam ex parte dantis, quam accipientis licita sunt laicis, etiam negotii studio. . . . *Apparatus Ius Naturale*, to negotiationis: Causa XIV, q. 4, c. 1, *Clerici*, Paris Bibl. Nat. Lat. 15393, fol. 150^{rb}. . . . emptio et venditio . . . (etc) . . . omnes isti contractus liciti sunt laicis etiam causa negotiationis. Johannes Teutonicus, *Glossa ordinaria*, to quod autem: Causa XIV, q. 3, c. 1, *Quod autem*, Paris Bibl. Nat. Lat. 14317, fol. 156^{ra}.

⁴⁸ Laico aut unde licet emere vilius et vendere carius. dum tamen non faciat ex cupiditate. sed ut provideat sibi et suis in necessariis. Laurentius Hispanus, *Apparatus*, to Causa XIV, q. 3, or 4(?), Paris Bibl. Nat. Lat. 15393, fol. 150^{ra}.

⁴⁹ Raymond of Peñafort, *Summa* II, 8, par. 1, p. 244. Also in Vincent of Beauvais, *Speculum doctrinale* X, 125, p. 972.

in a passage later reflected in Goffredus of Trani⁵⁰ emphasized the factor of intention in economic activities. The ultimate end or purpose was the final criterion for justifying or condemning individual transactions of sale. The influence of the theories of the Decretists of the twelfth century on the Canonists of the post-Gregorian period is best represented in the *Gloss* (1241–1250) of William of Rennes to the *Summa* of Raymond of Peñafort. In somewhat harsh terms Raymond had condemned profits from sale as *turpe lucrum* and sinful.⁵¹ William objected to this unqualified condemnation and maintained that the deciding criterion of sale was whether it was conducted out of the motive of *cupiditas* or not.⁵² This factor William defined as:

a wanton desire for having temporal riches, not for necessary use or utility, but for curiosity, so that the fancy is charmed by such, just as a magpie or a crow is enticed by coins, which they discover and hide away.⁵³

If a merchant bought and sold, not for necessary and useful purposes, but rather to satisfy an insatiable greed for wealth, he was sinning mortally by conducting his affairs *ex cupiditate*. If, however, the merchant acquired profits for the purpose of maintaining himself and his family, he was not in danger of mortal sin.⁵⁴ A moderate income (*lucrum moderatum*) was permitted to remunerate him for his services.⁵⁵ In a passage indicative of the later conceptions of the Canonists of the thirteenth century, William of Rennes summarized the ethical position of the merchant of that era:

Although business can scarcely be conducted without sin, merchants may receive a moderate profit from their wares for the maintenance of themselves and their families. Since they work for all and perform a kind of common business by transporting merchandise back and forth between fairs, they should not be held to pay their own wages. From the merchandise itself they can accept a moderate profit, which is regulated by the judgment of a good man, because the amount of profit permitted cannot be exactly determined in shillings, pounds, or pennies.⁵⁶

The merchant performed a valuable service by transporting and distributing goods throughout society. It was only just that his commercial contribution to the welfare of society should be rewarded by a moderate profit so that he could maintain himself and his family.

An interesting aspect of this discussion of William of Rennes was the manner in which the moderate

⁵⁰ Goffredus of Trani, *Summa* V, 19, fol. 214^{rb}.

⁵¹ Raymond of Peñafort, *Summa* II, 7, par. 9, p. 235.

⁵² William of Rennes, *Glossa*, to emunt: *Summa Raymundi* II, 7, par. 9, p. 235.

⁵³ *Ibid.* to cupiditatem: II, 8, par. 1, p. 244. Also in Vincent of Beauvais, *Speculum doctrinale* X, 125, p. 972, 973.

⁵⁴ *Ibid.*, to peccant: II, 7, par. 9, p. 235. Reproduced in Monaldus, *Summa perutilis*, v^o de usura, fol. 290, and Vincent, *Speculum* X, 112, p. 964.

⁵⁵ *Ibid.*, to necessitatem: p. 236. Reproduced in Monaldus, *Summa*, v^o usura, fol. 290; Vincent, *Speculum* X, 112, p. 964.

⁵⁶ *Ibid.* to recto fine: II, 8, par. 5, p. 248. Also in Vincent, *Speculum* X, 129, p. 976.

profit was to be regulated. At this point the Canonists turned their attention from law which was enforceable in courts to principles advocated in the confessional. Since it was impossible to compute the just profit in specific terms, which would cover every occasion, the final determination of reasonable profit was left to the judgment of a good or competent man (*ad arbitrium boni viri*). The discussion of William of Rennes was written as a gloss to a passage of Raymond of Peñafort, which urged the penitential confessor to direct cautiously and carefully the intentions of merchants so that they might labor and perform their duties towards right ends.⁵⁷ In a passage apparently inspired by that of Raymond, Hostiensis continued the discussion of William.⁵⁸ The priest as confessor to the merchant was to guide the activities of the commercial man towards honorable purposes free from fraudulent practices. Moreover, the bishop was interpreted to be the *bonus vir* who could estimate the just value of a moderate income. In this manner Hostiensis advocated the clerical supervision of mercantile activities in the confessional, even to the point of setting rates of profit for the merchants. This principle of Church regulation of commercial functions seems to have been inspired by the Carolingian canon *Placuit*, which was included by Raymond of Peñafort in the *Decretales* of Gregory IX, and which delegated to local priests the responsibility of seeing that prices offered to strangers were not greater than those of the local markets.⁵⁹ Finally, Hostiensis justified mercantile profits derived from buying cheap and selling dear as compensation for the merchant of labor and expenses. This basis for commercial gain was that formulated by the early Decretists.⁶⁰ Since the middle of the twelfth century the two factors of *labores* and *expensae* were of crucial importance in the Canonists justification of all kinds of economic increment and profit. Their significance will be further considered in the writings of the theologians of the thirteenth century.

These theories of buying and selling of the Decretalists of the thirteenth century differed in no essential respect from those of Rufinus, Huguccio, or other Decretists of the twelfth century. What changes occurred were in secondary matters. The clergy were allowed to raise animals for profit. In comparison to consideration given to lay enterprises, perhaps more attention than before was given to clerical transactions. Along with the theories of sale of Roman law, therefore, the analysis of the earlier Decretists was concurrently perpetuated by the Canonists of the thirteenth

century. The Decretalists became heirs to these two legal traditions of the medieval theories of sale.

In treating profits from loans or usury the Canonists of the twelfth century found it necessary to inquire into profits from buying and selling. There was another connection, however, between the two areas. Contracts of sale often were employed by merchants fraudulently to disguise usury. The popes of the Interim period continued the definition of and fight against usury in their decretals. Several of the decretals of this period dealt with the problem of sale in which usury was implicated, and also served to develop the canonists' conceptions of sale and the just price.

Sometime between 1159 and 1181 Pope Alexander sent a letter entitled *In civitate* to the Archbishop of Genoa advising him about certain practices of merchants. This letter was included by Bernard Balbi of Pavia in *Compilatio prima* and was finally recognized by the *Decretales* of Gregory IX. The specific practice under question was a device of merchants buying goods, such as cinnamon or pepper, which were not worth more than five pounds at the time of contract, and promising to pay over six pounds for the goods at a future stipulated time. Alexander admitted that in this form the contract could not be considered as usurious and such practices were not sinful as long as there was doubt as to the exact value of the goods at the future time of the payment of the price.⁶¹

Although in this type of contract there was a discrepancy between the lower present value of the goods and the higher contract price to be paid at a later date, the Decretalists realized fully that there was no question of the merchants being deceived in the original contract price. Both Alanus Anglicus (*ca.* 1210) and Tancredus stated that the merchants knew that the goods were worth less than the contract price but agreed to the increased evaluation because of the delay permitted in paying the price.⁶² Simple deception did not enter the case. Although the full circumstances behind these particular practices of merchants are not related, the apparent *raison d'être* of the decretal was the fear of potential speculative transactions. For example, certain merchants at a time when prices are cheap buy up certain quantities of goods worth only five pounds at the time. Not having sufficient money to pay for the goods, they offer six pounds, a slightly

⁶¹ *Comp. I: V, 15, c. 8, In civitate*. The text is found in X: V, 19, c. 6, *In civitate*. Cf. Jaffé-Wattenbach, *Regesta*, 13965.

⁶² Non decepti in iusto precio. scienter decepti essent quod ultra iustum precium darent. Alanus, *Apparatus*, to *comperant: Comp. I: V, 15, c. 8, In civitate*, Paris Bibl. Nat. Lat. 3932, fol. 64^{ra}. The Tancredus version of the Alanus gloss expands the phrase somewhat: non decepti in iusto precio. sed scienter plus emerunt propter dilationem solutionis. Tancredus, *Apparatus*, to *comperant: Comp. I: V, 15, c. 8, In civitate*, Paris Bibl. Nat. Lat. 3931A, fol. 71^{ra} and 14321, fol. 65. Cf. the version in Bernard Botone of Parma, *Glossa ordinaria*, to *comperant: X: V, 19, c. 6, In civitate*.

⁵⁷ Raymond of Peñafort, *Summa* II, 8, par. 5, p. 248.

⁵⁸ Hostiensis, *Summa aurea*, Lib. V, de poen. et remis., Quid de negotiatoribus, p. 1480.

⁵⁹ X: III, 17, c. 1, *Placuit*. For the Carolingian origins of the canon, see above p. 33. It was included in *Comp. I: III, 15, c. 2, Placuit*. In his version of the canon, Hostiensis delegated responsibility of supervision to the bishops. *Loc. cit.*

⁶⁰ See above, p. 39 ff.

higher price, on the condition that they are not obligated to pay the price until a future stipulated time. This future stipulated time the merchants have set either in the certain knowledge of or in the hopes of a rise in prices. At the future date when the prices are significantly higher, for example, seven pounds or more, the merchants resell the goods, pay the contract price of six pounds, and profit from the difference. This type of practice was simply speculative buying and selling which had been vigorously forbidden by the canon *Quicumque* (*Causa XIV*, q. 4, c. 9) of the *Decretum* and the twelfth-century Decretists. Johannes Teutonicus saw the logical relation between the new papal decretal *In civitate* and the old canon *Quicumque*, and noted that relationship in a gloss to the latter.⁶³ It was definitely *turpe lucrum* and sinful to buy cheap and sell dear with the clear intention of making profits from changes in the times and seasons.

On the other hand as the decretal stated, if there rested considerable doubt as to the exact value of the goods at the future time of payment, no sin was incurred in the contract. Alanus Anglicus added that the contract was legitimate if both the buyer and the seller stood an equal chance of gaining or losing in the delay of the payment,⁶⁴ and Raymond of Peñafort emphasized the factor of doubtful outcome in his summary of the practice.⁶⁵ The existence of an uncertain attitude in the mind of a merchant as to the future state of the market, however, is impossible to prove or disprove in a court of law. According to the decretal one could only be condemned by his intentions, and intentions went beyond the pale of legal proof. The Decretalists and even the decretal itself recognized the problem. Alanus Anglicus stated that this form of usury existed only in the mind and could not be brought to legal judgment.⁶⁶ The text of the decretal made such practices an affair between the soul and God, before Whom no sinful intention could be hidden.

The factor of doubtful outcome was also used by the Decretalists of the post-Gregorian period as a device to exonerate certain kinds of buying transactions from the

charge of usury. A decretal of Gregory IX in 1234 repeated the principle. It was one of almost two hundred new opinions which appeared in the *Decretales* under the name of Gregory IX. These laws were placed at the end of each title and often supplied the necessary juridical basis for supplementing the deficiencies of the other legislation contained in the title. It appears as if Raymond of Peñafort in compiling the *Decretales* noted certain omissions and problems within the titles, drafted a series of decretals to clarify these issues, secured the signature of Gregory for these statements, and included them in the various titles. Such an explanation would account for the decretal *Naviganti* at the end of the title *De usuris*, which was referred to as: "Gregory IX to Brother R." This decretal, among other things, summarized the principle of *In civitate* that over-evaluation of goods in loans or sale with deferred payment was permitted as long as there was reasonable doubt as to the future outcome of the market.⁶⁷

Although the Canonists continued to stress the importance of intentions in contrasting usurious with permissible contracts,⁶⁸ they seemed to welcome more objective devices which were capable of legal demonstration for adjudicating cases of usurious sale. One of these devices was provided in the decretal *Consuluit*. Between 1185 and 1187 Pope Urban III sent this decretal to a priest in Brescia instructing him about three forms of usury. The papal statement was collected in the *Compilatio prima* and finally placed in the *Decretales* of Gregory IX. Among these three forms of usurious contracts was the case of a merchant who sold his goods at an unusually high price (*longe maiori pretio*) in a contract of deferred payment. Along with the other cases Urban condemned this kind of sale as usurious and immoral (*male agere*).⁶⁹ As the Decretalists pointed out, this kind of sale under discussion in *Consuluit* was basically similar to that in *In civitate*.⁷⁰

A device which could be legally demonstrated was applied to transactions of deferred payment. In such cases grossly high prices became a certain indication of usurious intentions and eliminated the factor of "reasonable doubt." More and more the Canonists used the unusually high price as a standard for determining usury. In the Interim period Johannes Teutonicus eliminated the factors of "doubt" when prices greatly exceeded the market price.⁷¹ During the later period William of Rennes in a gloss to Raymond of Peñafort stated plainly that the excessive price presumed that the factor of

⁶³ Si aliquis vendat merces que modo valent quatuor. et facit pactum ut ei dentur quinque ad terminum prefixum illud non est usura, si dubium est quantum possunt valere merces ille ad terminum prefixum, ut *extra prima. de usuris. in civitate*. sed si venderet longe cariori foro quam modo, tunc esset usura. Johannes Teutonicus, *Glossa ordinaria*, to *modium: Causa XIV*, q. 4, c. 9, *Quicumque*, Paris Bibl. Nat. Lat. 14317, fol. 156^{rb}.

⁶⁴ Tunc enim equaliter emptor et venditor commodum vel in commodum ex dilatione expectant . . . et est hic ar. quod ratione dubii licet. quod aliter non licet. Alanus, *Apparatus*, to *nisi dubium: Comp. I: V*, 15, c. 8, *In civitate*, Paris Bibl. Nat. Lat. 3932, fol. 64^{ra}. Cf. the same version in Tancredus, Paris Bibl. Nat. Lat. 3931A, fol. 71 and 14321, fol. 65.

⁶⁵ Raymond of Peñafort, *Summa II*, 7, par. 3, pp. 228, 229. Also in Vincent of Beauvais, *Speculum doctrinale X*, 104, p. 958.

⁶⁶ . . . quod hec species usure in animo tantum consistit. quod si esset de hoc peccato in iudicio accusari non potest. puto tamen quod usura sic accepta. repeti possit in iudicio. Alanus, *Apparatus*, to *cognitiones: Comp. I: V*, 15, c. 8, *In civitate*, Paris Bibl. Nat. Lat. 3932, fol. 64^{ra}.

⁶⁷ X: V, 19, c. 19, *Naviganti*.

⁶⁸ For example in the post-Gregorian period: Goffredus of Trani, *Summa V*, 19, fol. 214^{rb}. Bernard Botone of Parma, *Glossa ordinaria*, to *male agere: X: V*, 19, 10, *Consuluit*.

⁶⁹ *Comp. I: V*, 15, c. 12, *Consuluit*. Text found in X: V, 19, c. 10, *Consuluit*. Cf. Jaffé-Wattenbach, *Regesta*, 15726.

⁷⁰ See above, p. 49.

⁷¹ See above, n. 63. This gloss of Johannes Teutonicus was preserved by Bartholomew of Brescia in the *Glossa ordinaria*, to *modium: Causa XIV*, q. 4, c. 9, *Quicumque*.

doubt no longer existed.⁷² Several Canonists of the post-Gregorian period also used the factor of an uncommonly high price to eliminate legally the ambiguities of "doubt" concerning future prices.⁷³ If a man was willing to pay a high price for a deferred payment, he was no longer thought to be doubtful about the future outcome of the market. In this way usury was indicated by the normal value of goods.

Similarly an excessively small price was another indication of usurious sale. During the Interim period the decretal *Ad nostram noveris* cited the case of a pseudo-contract of sale which was used to hide interest for a loan of money. A certain creditor M. lent a sum of money to a debtor R. Concurrent with the transaction, the creditor received from the debtor some houses and olive trees under the title of sale with the condition that sometime between the seventh and the ninth year after the first sale the debtor could buy back the house and trees for forty *uncia tarenorum* which was scarcely one-half the just price of the properties in question. In a letter of 4 March, 1203, to the Bishop of Polignano, Innocent III judged the contract to be fraudulently usurious and ordered M. to restore the house and trees. The letter was included in *Compilatio tertia* by Peter Beneventanus and eventually became a part of the *Decretales* of Gregory IX.⁷⁴ The exact details of the case in question are not completely evident, nor were they too clear to the medieval commentators. The contract of alienation of goods by sale to be later recovered by sale after a certain period of time was not considered by the Canonists to be a genuine contract of sale but rather a contract of security (*pignus*). The whole fiction of sale and resale was regarded by the lawyers of the papal *curia* as a usurious device for acquiring interest for the original loan of money. Obviously the creditor was collecting the revenues from the properties for the seven to nine years they were in his possession, in order to receive interest for his original loan of money.

What is interesting from the standpoint of the Canonists' theory of sale and the just price is the method by

which the Decretalists examined and analyzed this contract. According to Tancredus, they did not regard the actual terms of the written agreement, but observed the acts of the contracting parties.⁷⁵ The feature that aroused the Canonists' suspicions was the inadequate price of the second sale which was scarcely half the just price. In a comment accepted by Johannes Teutonicus and Bernard Botone of Parma, Laurentius Hispanus stated that the quantity of price was an indication of fraud, and a trifling price showed that the sale was not genuine.⁷⁶ Hostiensis explained how this device worked in ordinary economic dealings. For example, I might go to a creditor seeking a loan of money which he was unwilling to lend me because of the prohibitions against usury. Instead, he would lend me the money if he could buy one of my possessions, which he would return to me for the same price at a certain future time when I returned the money loaned. This type of contract was presumed to be usurious, especially if he bought my possession at a price greatly below the just price.⁷⁷

A certain group of Canonists represented by Vincentius Hispanus, Innocent IV and Bernard of Montemirato (Abbas Antiquus, d. 1296) contested this use of the just price to detect usury. Basing their arguments on the principle of Roman law that fraudulent sale is indicated by fraudulent acts and not by suspicious prices,⁷⁸ they contended that the small price was not sufficient evidence of usury, and other factors were necessary to prove such fraud.⁷⁹ Despite the controversy an influential group of Canonists decided that extreme prices either above or below the just price were sufficient evidence of usurious fraud. Through the application of the decretals *Consuluit* and *Ad nos-*

⁷⁵ *Emptione pignoris causa facta non quod rescriptum. sed quod gestum est inspicitur. . . .* Tancredus, *Apparatus*, to *emptionis*: *Comp. III*: III, 14, c. 1, *Ad nostram noueris*, Paris Bibl. Nat. Lat. 3931A, fol. 184^{rb}.

⁷⁶ *Et ita quantitas precii est argumentum doli. . . . et sessio simulata presumitur propter modicum pretium. . . . quantitate precii presumitur an aliquid sit venditum.* Johannes Teutonicus, *Apparatus*, to *dimidiam*: *Comp. III*: III, 14, c. 1, *Ad nostram noueris*, Paris Bibl. Nat. Lat. 3930, fol. 164^{ra}. The larger part of the Johannes manuscripts carry the seal of Laurentius. Cf. Bernard Botone of Parma, *Glossa ordinaria*, to *dimidiam*: X: III, 17, c. 5, *Ad nostram noueris*. Also Raymond of Peñafort, *Summa II*, 7, par. 6, p. 232. Vincent of Beauvais, *Speculum doctrinale* X, 107, p. 960.

⁷⁷ Hostiensis, *Summa aurea*, Lib. V, de usuris, par. 9, p. 1291.

⁷⁸ C. 4, 44, 10.

⁷⁹ *Propter modicum pretium non presumitur cessionem esse simulatam.* Vincentius Hispanus, *Apparatus*, to *dimidiam*: *Comp. III*: III, 14, c. 1, *Ad nostram noueris*, Paris Bibl. Nat. Lat. 14611, fol. 93. After the *Decretales* of Gregory IX Vincentius maintained his former position: *Apparatus*, to *dimidiam*: X: III, 17, c. 5, *Ad nostram noueris*, Paris Bibl. Nat. Lat. 3967, fol. 129 and 3968, fol. 108. Innocent IV, *Apparatus*, to *dimidiam*: X: III, 17, c. 5, *Ad nostram noueris*, 255. The somewhat ambiguous opinion of Innocent was clarified by Bernard of Montemirato (Abbas Antiquus), *Lectura*, to *dimidiam*: X: III, 17, c. 5, *Ad nostram noueris*, in *Perillustrium doctorum commentarii* 1: fol. 103^{ra}.

⁷² William of Rennes, *Glossa to Summa Raymundi II*, 7, par. 3, p. 229. Also in Vincent of Beauvais, *Speculum doctrinale* X, cap. 104, p. 959.

⁷³ *Usurarii censentur . . . qui vendit merces multo plus quam expectat pro solutione pretii.* Vincentius Hispanus, *Casus*, to X: V, 19, c. 10, *Consuluit*, Paris Bibl. Nat. Lat. 3969, fol. 30. Bernard Botone of Parma, *Glossa ordinaria*, to X: V, 19, c. 10, *Consuluit*. et utrum ille similiter teneatur qui merces suas longe maiori precio distrahit. si tempus solutionis prorogetur. . . . Johannes de Deo, *Casus*, to X: V, 19, c. 10, *Consuluit*, Paris Bibl. Nat. Lat. 3971, fol. 29, and 3972, fol. 42^{rb}. Peccant mercatores specialiter . . . vendendo merces suas vel pannos longe maiori precio sub expectatione quam venderent si solueretur eis pecunia in presenti. Johannes de Deo, *Liber poenitentiarius*, Lib. VI, Tit. 9, Paris Bibl. Nat. Lat. 14703, fol. 110.

⁷⁴ The original letter is found in Innocent III, *Regesta VI*, c. 15, P.L. 215: 22, 23; *Comp. III*: III, 14, c. 1, *Ad nostram noueris*: X: III, 17, c. 5, *Ad nostram noueris*. Cf. Potthast, *Regesta*, 1852.

tram noveris the just price became a measuring stick for determining the presence of usury in contracts of sale.

In 1234 the decretal *Naviganti* of Gregory IX not only reinforced the older principle of "doubt" in usurious sale, but also introduced another principle into the Canonists' discussions. The decretal stated that creditors who advanced money to merchants traveling by sea or going to fairs and who exacted interest for bearing the risks of the voyage were to be condemned as usurers.⁸⁰ It seems safe to assume that *Naviganti* refers to the medieval practice of sea loans or *foenus nauticum* in which creditors took interest on loans to "merchant adventurers" (*navigantes*) in compensation for assuming the risks of the voyage. Although the Canonists fully realized that the interest was direct compensation for risks, they still generally supported the opinion of Gregory that sea loans were usurious.⁸¹

While the post-Gregorian Canonists held fast in the realm of loans, they showed signs of willingness to make accommodations in the realm of sale for profits based on the factor of risk. The Canonists seemed to be generally disposed to allow gains in commercial transactions based on additional contributions of labor and expenses. Later in the thirteenth century they began to discuss risk in the same terms as a justification for profit. Innocent IV permitted the increase of prices in such contracts of sale in compensation for both labor and risk (*labor suus et periculum multum*). Just as prices could be raised by reason of change of time, so could they be increased by reason of risks involved in change of place.⁸² Bernard of Montemirato (Abbas Antiquus) continued the discussion of Innocent by stating that profits acquired in such manner

could be considered as hiring of services (*locatio operarum*) and storage of goods which merit compensation.⁸³ To some of the later Canonists of the thirteenth century the element of risk joined the ranks of labor and expenses as economic factors which could be justifiably compensated through additional profits.

III. THE ESTIMATION OF THE JUST PRICE

With the Romanists, the Canonists of the twelfth and thirteenth centuries did not require the legal enforcement of the full just price in contracts of sale. The just price was nevertheless an important device for determining not only the limits of *laesio enormis*, but also the presence of usury in contracts of sale. The Canonists were eventually confronted with the important question of how the just price was estimated. Within the body of Canon law the determination of this question arose principally in two legal occasions. The decretal *Quum causa* concerned the adjudication of a case of *laesio enormis*, and in the edition of Gregory IX the section of this decretal which concerned the fixing of the just price was placed under the title *De testibus* (II, 20, c. 42). In this section the witnesses who previously had testified that the contract price of a certain sale was below one-half the just price, were recalled to determine exactly what was the just price. Here the exact value of the just price was directly under question. The other principal occasion in the *Decretales* for the assessment of true monetary value of goods occurred in *In civitate* (V, 19, c. 6). This decretal concerned the over-evaluation of goods in a contract of sale in return for deferred payment. Since the recognition of over-evaluation presupposed the knowledge of the true value, the determining of the just price was involved. This decretal also concerned the nature of price changes. In an effort to combat speculative sales, it introduced the factor of "doubt" as to whether the prices of goods would increase or decrease. In order to determine whether the "doubt" about the future prices was genuine or not, the decretal required a knowledge of the nature of price fluctuations. Within the context of these two decretals the Canonists generally discussed the method of finding a just price.

Preliminary to the discussion of determining prices were the factors of time and place of the sale. The principle that all prices should be judged according to their specific time and place was fundamental in Roman law.⁸⁴ The Decretalists, likewise, in discussing *laesio enormis* emphasized that the value of goods at the time of sale must be considered and not at the time of litigation;⁸⁵ otherwise, all improvements added by the

⁸⁰ X: V, 19, 19, *Naviganti*. For the other part of the decretal, see above, p. 50.

⁸¹ E.g. Bernard Botone of Parma, *Glossa ordinaria*, to *periculum*: X: V, 19, c. 19, *Naviganti*. Coulton, *History* 6: 71-76, 1921, claims that there is a direct contradiction between the prohibition of interest from sea loans in *Naviganti* and the justification of profits in trading partnerships (*societates*) found in Thomas Aquinas, *Sum. theo.* II, II, qu. 78, a. 2, ad 5. The Canonists, however, always made a formal distinction between a loan (*mutuum*) and other kinds of contracts such as partnerships. *Naviganti* referred specifically to a *mutuum* and Thomas Aquinas to a *societas*. Consistent with the usury tradition, the Canonists condemned any profit based on a *mutuum*, while Thomas justified profits based specifically on partnerships. The distinction between the two was not entirely formal and meaningless, but was fundamentally based on the factor of risk. In a partnership both parties shared all of the risks, including the sea voyage and the final success or failure of the trading. In a sea loan, however, the creditor undertook only the risks of voyage, not the eventual risks of business. The sea loan, therefore, was only a partial risk-bearing instrument and not entirely comparable to the partnership. For the discussions of the Canonists and theologians, see Noonan, *Scholastic analysis of usury*, 136-145.

⁸² Innocent IV, *Apparatus*, to *periculum*: X: V, 19, c. 19, *Naviganti*, p. 338. The version of Innocent found in Bernard of Montemirato (Abbas Antiquus) appears to be better than that of the Lyon edition of Innocent. *Lectura*, to *venditurus*: X: V, 19, c. 19, *Naviganti*, fol. 140^{rb}.

⁸³ *Ibid.* to *periculum*.

⁸⁴ See above, p. 20 and p. 28.

⁸⁵ E.g.: nam tempus illud inspicere debet. Laurentius Hispanus, *Apparatus*, to *venditionis*: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3932, fol. 161. Tempus enim contractus inspiciendum est, non sententia. Tancredus, *Apparatus*, to *tem-*

buyer between the time of the original sale and that of the judicial proceedings would confuse the issue.⁸⁶

The Canonists often adopted the legal devices of the Romanists for discovering the just price. As we have seen, the canon *Si quis clericus* (*Causa XIV*, q. 4, c. 5) of the *Decretum* concerned the problem of equivalence between goods and money in reference to loans. This equivalence Gratian had termed the just price.⁸⁷ In the Interim period this equivalence was found by the *arbitrium boni viri* of Roman law in the *Apparatus Ius naturale* and by a judge in Johannes Teutonicus.⁸⁸ The witnesses required in the decretal *Quum causa* to prove the just price of a piece of land under litigation of *laesio enormis* also bore strong resemblance to the *boni viri* of Roman law.⁸⁹ In the commentaries of the Decretalists the number of these witnesses was often set at ten.⁹⁰

The criteria by which the Canonists assessed a just price were also those of Roman law. Laurentius Hispanus, Johannes Teutonicus, and Tancredus in the Interim period advised the witnesses who determined the just price of land in a case of *laesio enormis* that they should consider the quality of the land and the quantity of its revenues. In discussing the factor of revenues perhaps they added an innovation to the criteria of the Romanists. The value of property equalled the sum total of its revenues for certain lengths of time.⁹¹ Two periods of time, fifty years and twenty

years, were offered. Although each period was based on a passage from the *Novellae*,⁹² it is not quite clear why the two divergent lengths of time were given. Nevertheless, the importance of the innovation is the somewhat objective and mechanical means of finding the value of lands by multiplying their annual rents by fifty or twenty years. In the post-Gregorian period Vincentius Hispanus and Hostiensis rehearsed these standards of Roman law for appraising land although Hostiensis was personally inclined to place more importance on the device of *communis aestimatio* or the price which the land commonly fetched.⁹³

In the body of Canon law cases of *laesio enormis* occurred more frequently in sales of land or immovables than in transactions of movables which did not contain the economic factor of rents or revenues. With the absence of rent as an indication of true value, how was the just price of movables to be determined? The answer of the Decretalists to this question is found chiefly in their discussions of the decretal *In civitate*, where the usurious sale of movable goods was in question. Here they answered that the just price of all goods was the current price. Generally speaking, this current price was interpreted as the price which goods actually fetched. This general principle was obviously based on the medieval Romanists' interpretation of the statement in the Digest that prices should not be set by individual affections, but should be the result of a common estimation.⁹⁴ The *Glossa ordinaria* of Accursius, for example, interpreted this *communis aestimatio* as the price which goods commonly fetch.⁹⁵ In ecclesiastical sources this standard for assessing prices was indeed an ancient one and went back at least to the Benedictine Rule of the sixth century. Although Benedict instructed monastic craftsmen to sell their goods at prices cheaper than those of the people of the world in order to exercise piety, nonetheless, his basic standard of reference was the current market price.⁹⁶ A Carolingian canon, *Placuit*, which was later incorporated in the *Decretales* of Gregory IX, forbade the sale of goods to strangers at prices exceeding those of the market place.⁹⁷ The Decretists of the twelfth century also recognized this interpretation of common

price: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3931A, fol. 184^{rb}.

⁸⁶ Pone quod tempore venditionis fundus valent .x. tempore litis valet .xxx. sine studio monachorum vel alio modo. numquid ideo revocabitur venditio. non quia spectandum est tempore venditionis. Tancredus, *Apparatus*, to *valentem*: *Comp. I*: III, 15, c. 4, *Quum dilecti*, Paris Bibl. Nat. Lat. 3931A, fol. 34^{ra}. Raymond of Peñafort, *Summa II*, 7, par. 8, p. 235. Also in Vincent of Beauvais, *Speculum doctrinale* X, 109, p. 962.

⁸⁷ See above, p. 35, n. 42.

⁸⁸ Quantum vir bonus arbitrabitur debitos nummos valere tempore solutionis faciende. . . . *Apparatus Ius naturale*, to *mercandi*: *Causa XIV*, q. 4, c. 5, *Si quis clericus*, Paris Bibl. Nat. Lat. 15393, fol. 151^{ra}. A iudice vel ab alio hoc vult dicere quod creditor debet frumentum pro tanta pecunia recipere, quantum aliquis decreverit, quod valet tempore solutionis. Johannes Teutonicus, *Glossa ordinaria*, to *decretum*: *Causa XIV*, q. 4, c. 5, *Si quis clericus*, Paris Bibl. Nat. Lat. 14317, fol. 156^{rb}.

⁸⁹ See above, p. 27 ff.

⁹⁰ Cf. the commentary of Johannes Teutonicus: videtur quod non potuerunt (probare) excessum deceptionis quando probaverunt quantitatem valentie rei. Respondeo hoc modo potuit esse. quia cum res essent vendite decem testes dicerunt quod valebant multo plus quam viginti. sed non taxabant certum pretium rei valentie quod iterum probari debet. vel constitit pape per confessiones partium quod res valebant ultra dimidiam iusti precii: sed non conveniebant de quantitate valoris quem monachi debent probare. unde non producuntur hic testes super eodem casu tamen super eodem possunt induci in tali casu. quia ad aliud agitur modo quam prius. *Apparatus*, to *quantitatem*: *Comp. III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3930, fol. 164^{rb}. Cf. Tancredus' version, Paris Bibl. Nat. Lat. 12452, fol. 74^{ra}, and 3931A, fol. 185^{ra}.

⁹¹ Sed qualiter probabit rei pretium. dic quod ex qualitate rei et quantitate reddituum. . . . Respondeo id est quandoque

etiam tanti extimatur res quantum potest de pensionibus colligi in .l. annis . . . quandoque autem quantum in .xx. annis. Laurentius Hispanus, *Apparatus*, to *probare*: *Comp III*: III, 14, c. 2, *Quum causa*, Paris Bibl. Nat. Lat. 3932, fol. 161^{ra}, and 15398, fol. 162. It was also included in Johannes Teutonicus, Paris Bibl. Nat. Lat. 3930, fol. 164^{rb}, and Tancredus, Paris Bibl. Nat. Lat. 3931A, fol. 185^{ra}.

⁹² For fifty years: Nov. 120, c. 9, pr. and for twenty years: Nov. 7, c. 3, par. 1.

⁹³ Vincentius Hispanus, *Apparatus*, to *quantitatem*: X: II, 20, c. 42, *Quum causa*, Paris Bibl. Nat. Lat. 3967, fol. 90. Hostiensis, *Commentaria*, to *articulum*: X: II, 20, c. 42, *Quum causa*, 2: fol. 101^{ra}.

⁹⁴ See above, p. 21, n. 100.

⁹⁵ See above, p. 28, n. 75.

⁹⁶ Benedict, *Rule*, LVII, p. 128, 129.

⁹⁷ X: III, 17, c. 1, *Placuit*. See above, p. 33 and p. 49.

estimation. In discussing the canon *Si quis clericus* (*Causa XIV*, q. 4, c. 5) of the *Decretum*, which concerned the equivalence of goods and money, Simon of Bisignano described the true value of goods as the price for which they were commonly sold.⁹⁸ In the Interim period that which the gloss *Ius Naturale* called the just price, Raymond of Peñafort termed the common price of the market place (*communiter venditur in foro*).⁹⁹ By using the exact terminology of the *Glossa* of Accursius, Tancredus positively identified the true value of the goods involved in the decretal *In civitate* with the price for which they could be sold.¹⁰⁰ Bernard Botone of Parma adopted the gloss of Tancredus in the *Glossa ordinaria* to the *Decretales* and the formula: "a thing is worth as much as it can be sold for" became the Canonist equivalent for the just price.¹⁰¹ No Canonist of the later period has been found to disagree with this basic conception of the just price.¹⁰² Sometimes, as illustrated by the canon *Placuit*, Raymond of Peñafort, and Monaldus, this *communis aestimatio* was identified with the actual price on a market place (*forum*).

Since the true value of goods was best represented by the prices at which they were actually sold, the Canonists turned closer attention to the nature of these prices. They noticed the well-known phenomenon of prices that their fluctuations often tended to follow regular and calculable patterns. These patterns of price change concerned the Canonists' discussions relating to the principle of "doubt" in usurious sale. William of Rennes clarified this factor of "doubt" and thereby touched upon the nature of price changes. He stated that, if according to seasonal variations prices were accustomed to rise, doubt was eliminated and speculation on these regular fluctuations was usurious.¹⁰³ Hostiensis continued the discussion by quoting

⁹⁸ Hic queritur si mutauit tibi aureum puta usque ad festum natiuitatis et tunc non habes aureum. hoc vis mihi pro eo frumentum vel huiusmodi dare. an possint tantum de frumento exigere quantum poterat tempore quo mutauit haberi vel tantum quantum contra communi estimatione haberi potest. cum aureus redditur et placet quibusdam tantum me debere accipere. quantum tunc communiter vendi poterit cum aureus debet reddi. . . . Simon of Bisignano, *Summa*, to *Causa XIV*, q. 4, c. 5, *Si quis clericus*, Paris Bibl. Nat. Lat. 3934A, fol. 78^{va}.

⁹⁹ See above, p. 47, n. 35 and n. 36.

¹⁰⁰ Res tantum valet quantum vendi potest . . . precium enim rerum non ex affectu singulorum. sed communiter estimatur. Tancredus, *Apparatus*, to *valent: Comp. I: V*, 15, c. 8, *In civitate*, Paris Bibl. Nat. Lat. 3931A, fol. 71^{va}.

¹⁰¹ Bernard Botone of Parma, *Glossa ordinaria*, to *non valent: X: V*, 19, c. 6, *In civitate*.

¹⁰² For example: Res tantum valet quantum vendi potest. . . . Vincentius Hispanus, *Apparatus*, to *valent: X: V*, 19, c. 6, *In civitate*, Paris Bibl. Nat. Lat. 3967, fol. 189. Innocent IV, *Apparatus*, to *non valent: X: V*, 19, c. 6, *In civitate*, p. 337. Hostiensis, *Commentaria*, to *non valent: X: V*, 19, c. 6, *In civitate*, 4: fol. 57^{ra}. Monaldus, *Summa perutilis*, v^o de usura, fol. 290.

¹⁰³ William of Rennes, *Glossa*, to *versimiliter dubitatur: Summa Raymundi II*, 7, par. 3, p. 228. Also in Vincent of Beauvais, *Speculum doctrinale* X, 104, p. 958.

Aristotle that knowledge of future or contingent things was not determined truth; nevertheless, a price cycle of a region (*secundum cursum regionis*) was not doubtful but probable knowledge.¹⁰⁴ According to Innocent IV (*dominus meus*), Hostiensis continued, if this seasonal fluctuation is well known to the men of the region (*communis opinio hominum*), then all doubt is eliminated.¹⁰⁵ Because of the prohibition against speculative buying and selling, the nature of price cycles became important to the Canonists.

With the possible exception of a deeper examination of the nature of price cycles, the Canonists of the thirteenth century added little that was new to the problem of estimating the just price. The methods employed were probably as old as medieval legal science itself. For the medieval legist, whether Romanist or Canonist, the just price or the true value of goods was simply the price which they currently fetched. This price could include either free competitive or officially regulated conditions. Since this price fluctuated according to different places, the just price was related to specific times and localities. Occasionally, in cases pertaining to land, the medieval legist used certain devices for finding the just price. Land might be compared with neighboring or similar land values to find its true value. The advice and counsel of well-informed inhabitants of an area might be relied upon for estimating its price. The value of its rents or revenues also indicated its just price. Essentially, however, these devices were means for judging the current value of land. That the current price was the fundamental factor was indicated by Hostiensis when he preferred a common estimation to one based on rents. This method for estimating prices may be found among the medieval Romanists, such as Azo, Accursius, and Odofredus, among the twelfth-century Decretists such as Simon of Bisignano, among the Decretalists of the Interim period such as Johannes Teutonicus, Tancredus, and Raymond of Peñafort, and among most of the post-Gregorian Canonists. This doctrine formed the contemporary legal setting for the theological counterpart of the just price.

IV. THE PROBLEM OF PRICE AND FRAUD

Since the Canonists accepted fully the Romanists' theories of free bargaining, *laesio enormis*, and the just price equated to the current price, they also inherited the important problem of sale and fraud. In free bargaining protected only from gross errors beyond the market price, the chief unjust prices possible were those produced by fraudulent actions. The Canonists likewise inherited the ambiguous terminology of Classical Roman law that suggested that cheating or deception was permitted in contracts of sale. As the

¹⁰⁴ Hostiensis, *Summa aurea* V, de usuris, par. 8, p. 1286.

¹⁰⁵ *Ibid.*, p. 1287. Hostiensis, *Commentaria*, to *versimiliter: X: V*, 19, c. 19, *Naviganti*, 4: fol. 59^{rb}.

Romanists did, they found it necessary to clarify explicitly the relationships between fraud and sale.¹⁰⁶ If the amount of citations is any indication, the Canonists attached even more importance than their colleagues in Roman law to the problem of sale and fraud.

At an early date in the twelfth century, the Roman lawyers developed a system of classification of *dolus* which affected contracts of sale. The Decretists of the early period were already aware of these classifications. In discussing the principle of free bargaining, Huguccio interpreted the word *naturaliter* as meaning *dolus* not intentionally (*ex proponito*) but naturally (*ex natura*), a distinction which was essentially that of the Romanists.¹⁰⁷ The real work of developing a system of relationships between fraud and sale began among the Canonists at the beginning of the thirteenth century. A passage from Laurentius Hispanus appears to have set the general pattern of the Canonists' discussions.¹⁰⁸ *Dolus*, which affects contracts of sale, he divided into three specific categories: First of all, there is *dolus dans causam*, or fraud which gives rise to a contract of sale. For example, because of your intentional deceit I sell something to you which, apart from your fraud, I would not have sold at all. As Hostiensis later illustrated the case: you wish that I would sell to you my collection of decretals, which I am unwilling to sell. You tell me a conscious falsehood that another compilation of decretals will soon appear, which will supersede my own. Believing this to be true, I sell

you my decretals.¹⁰⁹ Such *dolus* which produces a sale nullifies the contract completely as a legally binding transaction. In the second place, *dolus incidens* or "incidental" fraud affects the terms of the contract. For example, I sell something to you which I normally was willing to sell, but because of your deceit I sell it at disadvantageous terms. According to Hostiensis' illustration, I am willing to sell the decretals, but because of your falsehood I sell them at a lower price. In this case the contract remains legally valid, but the injury caused by fraud is capable of being remedied by legal action. Finally, there is a type of *dolus* which neither gives cause nor is "incidental" to the contract of sale. For example, without any fraudulent action on your part you sell me something at a price higher than the just price. You have not intentionally deceived me, but I am mistaken about the price. Unless the price is more than the limits permitted by *laesio enormis*, there is no legal remedy for this case because of the general principle of free bargaining. In the Interim period this gloss of Laurentius concerning sale and fraud was reproduced by Damasus and Tancredus. In the period after Gregory IX the problem seems to have been of sufficient importance that all of the major Decretalists treated it at some length. Although minor variations may be detected, most of their discussions were based obviously on the original passage of Laurentius.¹¹⁰

As is evident from a superficial examination, the Canonists' discussions of fraud and sale were strongly dependent on the classifications developed by the Romanists.¹¹¹ All three of the Decretalists' categories had their counterparts in the distinctions of medieval Roman law. The first classification of causal *dolus* reflected the equivalent distinction in Roman law and was obviously a *dolus ex proposito*. Of more importance to our study are the other two categories which affect primarily the price in a contract of sale. In the second classification intentional *circumventio* or *deceptio* in a contract of sale was a clear case of "incidental," but nonetheless, genuine *dolus*.¹¹² The damage caused by this intentional deception could be remedied in *bona fides* contracts by an *actio ex eo contractu*, even if, according to Hostiensis, this damage was the smallest

¹⁰⁶ For the Romanist discussions on price and fraud, see above, p. 29 ff.

¹⁰⁷ *Difficile est inter vendentes et ementes. cum ille velit carius vendere, et iste vilis emere. et cum ille velit pretium augmentare. et iste diminuire. et ideo ille per vera vel falsa nititur ut carius vendat. et iste ut vilis emat. ille excedit commendando. iste infra subsistit. unde lex dicit naturaliter licere contrahentibus se circumvenire in pretio venditionis et emptionis. . . . Idem pomponius alibi etiam dicit quod in vendendo et emendo naturaliter concessum est quod pluris sit, minoris emere. et quod minoris sit pluris vendere. et ita se invicem circumscribere. idem in locatione et conductione. . . . et intellige naturaliter quod non dolo ex proponito sed ex natura. id est communi voto hominum et ex consuetudine que est altera natura. Huguccio, *Summa*, to *De poen.* V, c. 2, *Qualitas*, Paris Bibl. Nat. Lat. 15397, fol. 169^b.*

¹⁰⁸ Cum dolus dat causam contractui, puta dolo induxi te ad vendicionem alicuius rei quam alias non eras venditurus; non tenet contractus. . . . Si vero incidit in contractum, puta quia venditurus eram, sed per conventionem tuam minoris vendidi; tenet quidem contractus sed agitur ad supplementum residui. . . . ubi vero nec dolus dat causam contractui nec incidit. sed cum venditurus eram vendidi tibi pro minori quam esset iustum pretium rei, nec me in venditione illa circumvenisti; tunc si vendita est res maioris quam dimidia iusti precii obtinet quod hic dicitur . . . non succurritur decepto quia licet contrahentibus sese ad invicem decipere. . . . Si postea quam. et nota quod in contractibus bone fidei. . . . Damasus, *Apparatus*, to *deceptione: Comp. I: III, 15, c. 4, Quum dilecti*, Paris Bibl. Nat. Lat. 3930, fol. 26^a. This gloss is attributed to Laurentius. A similar version is found in Tancredus, *Apparatus*, to *deceptione: Comp. I: III, 15, c. 4, Quum dilecti*, Paris Bibl. Nat. Lat. 3931A, fol. 34^a.

¹⁰⁹ Hostiensis, *Summa aurea* III, 17, par. 7, p. 749.

¹¹⁰ For example: Vincentius Hispanus, *Apparatus*, to *deceptione: X: III, 17, c. 3, Quum dilecti*, Paris Bibl. Nat. Lat. 3967, fol. 127; Goffredus of Trani, *Summa* III, 17, fol. 128; Bernard Botone of Parma, *Glossa ordinaria*, to *deceptione: X: III, 17, c. 3, Quum dilecti*; Innocent IV, *Apparatus*, to *promittunt: X: V, 19, c. 6, In civitate*, p. 337; Hostiensis, *Summa aurea* III, 17, par. 7, p. 749; Hostiensis, *Commentaria*, to *propendam: X: III, 17, c. 3, Quum dilecti*, 3: fol. 58^a; Monaldus, *Summa perutilis*, v^o de emptione, fol. 42.

¹¹¹ Cf. the general discussion in Fransen, *Le dol*, 87, 88, and 142, 143.

¹¹² For example: Vincentius Hispanus, Si vero incidit in contractum . . . per circumventionem suam minoris vendidi. *Loc. cit.* Also found in Goffredus of Trani, Bernard Botone of Parma, Hostiensis, *Commentaria*, *loc. cit.*

amount.¹¹³ This *dolus incidens* was positively identified by Hostiensis with the Romanist category of *dolus ex proposito*.¹¹⁴ In this manner, conscious deception in price was unmistakably identified with true *dolus*.

In direct contrast, the third category of the Canonists of the thirteenth century was completely free of all forms of conscious deception.¹¹⁵ Fraud which neither gives rise nor is "incidental" to contracts was positively identified by Goffredus and Hostiensis with the Romanists' theory of *dolus re ipsa*.¹¹⁶ Here *dolus* was simply an error in estimating the price in a bargain. In this category belonged the "circumvention" permitted by free bargaining and corrected by *laesio enormis*. As a matter of fact, this special distinction of the Romanists which interpreted *dolus re ipsa* as a kind of error was known to the Canonists as early as the twelfth century, as indicated by their use of Placentinus' corollary concerning knowledge. The Decretists of this period treated the question raised in the *Decretum* (*Causa X. q. 2, c. 2, Hoc ius*) of whether a church should attempt to get the best possible price for its goods on the market in order to pay off its debts more quickly.¹¹⁷ Simon of Bisignano and Huguccio posed the problem of an ecclesiastical administrator who knew, for example, that his goods were normally worth ten, but in the bidding on the market discovered a buyer who was willing to pay thirty. Because the seller definitely knew that the goods were not worth thirty, he was actually deceiving the buyer by accepting that price, and this deception was sinful. If an exceptional case arose where the buyer also knew that the goods were not worth the high price, his knowledge of and willingness to submit to the disadvantageous terms would eliminate the deception of the seller. Huguccio, however, stated the general principle clearly: "No church or any man out of certain knowledge should ever accept more for a thing than what it is worth during the bidding."¹¹⁸

¹¹³ Hostiensis, *Summa aurea* III, 17, par. 7, p. 749.

¹¹⁴ *Ibid.*

¹¹⁵ Vincentius Hispanus: *Ibi vero non dolus dat causam contractui nec incidit . . . nec in venditione ille circumvenisti; loc. cit.* Also Goffredus, *loc. cit.*

¹¹⁶ Goffredus, Hostiensis, *Summa aurea*, and *Commentaria*, *loc. cit.*

¹¹⁷ For the background of the canon, see above, p. 36.

¹¹⁸ *Plus offerenti dicitur*. *lex ista iniquitatem mandare et continere videtur. cum enim yconomus ecclesie noverit rem venalem non valere .x. puta aureos. si licitationibus intervenientibus offerantur pro ea .xxx. ultra dimidiam iusti precii videtur decipere. et circumvenire emptorem. ergo peccat. decipere ei peccatum est . . . ad hoc dicunt quidam quod non dicitur ecclesia talem decipere. scienti enim et volenti dolus non infertur. Simon of Bisignano, *Summa*, to *Causa X. q. 2, c. 2, Hoc ius*, Paris Bibl. Nat. Lat. 3934A, fol. 71^{rb}. in publico *plus offerenti*. utilitiora enim ecclesie semper respicere debemus . . . nec hoc dicitur quod ecclesia velit vel debeat aliquem decipere. sed quilibet caveat ibi sed ecce aliquis per licitationem offert multo plus quam valeat, forte duplum; ecclesia dat ei. nonne decipit eum. etiam ultra dimidiam iusti pretii. nisi quia volenti et scienti dolus non infertur. credo tamen nec ecclesiam nec aliquem hominem ex scientia certa debere plus*

The Decretists of the thirteenth century also accepted this interpretation and emphasized that freedom of bargaining did not permit fraud.¹¹⁹ Conscious knowledge or deliberate intentions of misevaluations in bargaining made resulting prices sinfully fraudulent.

The final results of the Canonists' classifications were similar to those of the Romanists. Against the background of the Decretalists' distinctions of fraud, the traditional phrase of free bargaining: *licet contrahentibus invicem se naturaliter circumvenire*, becomes clear. Such bargainings operate in agreements of good faith without intentional fraud, and in which the parties believe that they are telling the truth about the price.¹²⁰ Almost unconsciously Hostiensis finally changed the grammatical phrasing of the Classical formula to fit the realities of the medieval interpretation: *naturaliter possunt in precio decipi contrahentes*—contracting parties naturally could be mistaken in the price.¹²¹ When the rather mischievous terminology of the Classical phrase permitting free bargaining was rightly interpreted, the Canonists felt free to exonerate the activities of bargaining from charges of immorality. Perhaps for this reason Alanus Anglicus in the Interim period cleared free bargaining from the appearances of usury.¹²² Innocent IV in the post-Gregorian period

accipere quam res valeat, presertim si plus offertur per licitationem. Huguccio, *Summa*, to *Causa X. q. 2, c. 2, Hoc ius*, Paris Bibl. Nat. Lat. 15396, fol. 159^{ra}.

¹¹⁹ Sed quid si plus offerat quantum valeat. Respondeo. iustum pretium tantum debet recipere. licet lex dicat quod licet contrahentibus se invicem usque ad dimidium iusti precii decipere. *Apparatus Ius Naturale, to ut plus offerenti: Causa X. q. 2, c. 2, Hoc ius*, Paris Bibl. Nat. Lat. 15393, fol. 128^{rb}. Quid si offerat plus quam valet? Tunc tamen iustum precium recipiet. Lex dicat licet quod contrahentibus se invicem possunt fallere . . . sed ecclesia in suis contractibus non debet dolum facere. Johannes Teutonicus, *Glossa ordinaria*, to *plus offerenti: Causa X. q. 2, c. 2, Hoc ius*, Paris Bibl. Nat. Lat. 14317, fol. 132^{rb}. Also found to the same passage in the *Glossa ordinaria* of Bartholomew of Brescia. Cf. Fransen, *Le dol*, 141. Fransen interprets these passages as proposing an exceptional case for churches. He states that the church should always respect the just price even if the lesion which it has caused is plainly unintentional and without *dolus*. In the light of the preceding Decretists, such as Simon of Bisignano and Huguccio, it would appear, however, that the church should pay the just price when the injury is known and therefore intentional. There appears to be nothing exceptional about the case of the church.

¹²⁰ Hostiensis, *Summa aurea* III, 17, par. 7, p. 750. William of Rennes, *Glossa*, to *debet remove: Summa Raymundi* II, 7, par. 8, p. 235.

¹²¹ Hostiensis, *Commentaria*, to *quantitatem: X: II, 20, c. 42, Quum causa*, 2: fol. 101^{rb}.

¹²² Alanus, *Apparatus*, to *comperant: Comp. I: V, 15, c. 8, In civitate*, Paris Bibl. Nat. Lat. 3932, fol. 64^{ra}. The Tancredus version of Alanus is fuller: si enim decepti essent quod ultra precium darent, speciem usure non haberet. licet enim contrahentibus se invicem decipere . . . et hoc usque ad dimidiam iusti precii. sed non ultra. *Apparatus*, to *comperant: Comp. I: V, 15, c. 8, In civitate*, Paris Bibl. Nat. Lat. 3931A, fol. 71^{ra}, and 14321, fol. 65. It was reproduced in the *Glossa ordinaria* of Bernard Botone of Parma, to *non valent: X: V, 19, c. 6, In civitate*, and also in Hostiensis, *Commentaria*, to the same decretal, 4: fol. 57.

was bold to say that freedom of bargaining rightly understood was not sinful: *cum liceat contrahentibus se invicem decipere, non esset peccatum*. He compared the Classical formula to the dictum of the Apostle Paul, which was apparently contradictory: *Nemo in negotio circumveniat fratrem suum*.¹²³ According to Innocent the "circumvention" of the Apostle correctly interpreted meant either causal *dolus*, "incidental" *dolus*, or gross error which exceeded *laesio enormis*.¹²⁴

The distinctions between fraud and error in sale developed by the Roman and Canon legists were also reflected in the literature of the penitential system. Confessors who administered penance to merchants differentiated between fraudulent bargaining practices on the basis of intention. For example, Raymond of Peñafort distinguished between intentional deception which was a mortal sin and for which restitution was required, and unintentional and harmless deception, which was a venial sin and for which no restitution was apparently required.¹²⁵ Probably the intentional fraud of the penitential classification paralleled the legal *dolus ex proposito* and the unintentional fraud corresponded to the *dolus re ipsa* or mistake in price. In the section of his *Poenitentiale* devoted to merchants, Hostiensis accepted the basic solution of Raymond and embroidered upon it by describing in greater detail the fraudulent practices of commercial transactions.¹²⁶ Elsewhere he underlined the morally dangerous character of intentional deceit in buying and selling and complained that merchants would commit three or four mortal sins of falsehood in order to obtain a mere pittance of profit.¹²⁷ Conversely the ideas of the penitential literature were reflected in the legal writings. Because restitution was a device fundamental to the whole system of penance, absolution could not be granted for serious sins without its performance. Raymond of Peñafort demanded restitution for the mortal sin of intentional fraud, although he did not suggest restitution for the venial sin of unintentional or harmless deception. Perhaps Peter of Sampsona (fl. 1230-1260) was referring to intentional *dolus ex proposito* when he mentioned the necessity of restitution for deception in sale,¹²⁸ and most explicitly William of

Rennes was referring to unintentional *dolus re ipsa* when he maintained that absolution could not be withheld from one who refused to do restitution.¹²⁹

V. THE TWO FORUMS

The Canonists of the thirteenth century inherited two distinct legacies concerning the problem of sale. From Roman law they adopted the general scheme of free bargaining modified by *laesio enormis* and the specific notion which equated the just price with the current market price. From the Decretists of the twelfth century they adopted an analysis and justification of mercantile profits and a general prohibition against speculative commercial practices. On the surface there might appear certain contradictions between these two legacies, as, for example, the just price conceived as the current price conflicted with the general prohibition against speculative buying and selling. If, however, the two schemes of sale are viewed against the background of the Canonists' general conception of the two forums, then these contradictions could be more easily resolved.

From about the thirteenth century the jurisdiction of the Church was generally divided into two distinct areas: the external forum and the internal forum. The external forum, known in the Middle Ages as the *ius fori*, represented the right of the Church to judge her members in relation to the social body of Christendom. It was clearly a public ecclesiastical court in which offenses against the Church and her common law could be judged according to legal procedures similar to those of secular courts. The external forum was simply the jurisdiction of the Canonical courts. On the other hand, the internal forum, termed the *ius poli* in the Middle Ages, represented the right of the Church to judge her members in view of their personal and intimate relationship to God. This forum was simply the confessional in which the believer confessed his sins to his priest and received moral and spiritual guidance. The internal was kept wholly distinct from the external forum, and often apparent conflicts of jurisdiction could result. For example, evidence offered in the confessional could not be produced in the ecclesiastical court, and an excommunicate could be pardoned in the internal, but not necessarily in the external forum. To the Canonists, however, these conflicts did not present a real problem. The two forums merely represented two levels of judgment, the social and the personal, over which the Church had jurisdiction.¹³⁰

Viewed within this framework, the adopted system

Quum causa, Paris Bibl. Nat. Lat. 4248B, fol. 65, and 3972, fol. 201^{ra}.

¹²⁹ William of Rennes, *Glossa*, to *debet remove*: *Summa Raymundi* II, 7, par. 8, p. 235.

¹³⁰ Villien, A., *Dictionnaire de théologie catholique*, v° For. Van de Kerckhove, Martinien, La notion de juridiction chez les Décretistes et les premiers Décretalistes (1140-1250), *Ét. francisc.* 49: 454, 1937.

¹²³ See above, p. 13, n. 19.

¹²⁴ Innocent IV, *Apparatus*, to *promittunt*: X: V, 19, c. 6, *In civitate*, p. 337.

¹²⁵ Raymond of Peñafort, *Summa* II, 8, par. 5, pp. 247, 248. Also in Vincent of Beauvais, *Speculum doctrinale* X, 129, p. 975.

¹²⁶ Hostiensis, *Summa aurea* V, de poen. et remis., *Quid de negotiatoribus*, p. 1480.

¹²⁷ *Ibid.* Cui mercator, p. 1424.

¹²⁸ Hic habes notatum quod licitum est contrahentibus sese decipere citra dimidiam iusti precii. sed pone quod ego induxi aliquam ut mihi venderet decretales vel equum pro .xi. lib. et valent bene decretales .xiii. libras. et equus similiter. Numquid sibi teneor restituere id quod minus iusto precio dedi. dicas quod teneor restituere id quod minus iusto precio dedi in iudicio anime quia non dimittitur peccatum nisi restituatur ablatum. Peter of Sampsona, *Distinctiones*, to X: II, 20, c. 42,

of sale of Roman law would rightfully come under the jurisdiction of the external forum. Contracts of sale would be governed by the principle of free bargaining within the boundaries of *laesio enormis* or one-half the just price. Certain forms of usury fraudulently disguised in contracts of sale and certain forms of speculation could be condemned in the open court if prices were grossly discrepant with the just price. In the external forum the just price would be simply equivalent to the current market price.

To the supervision of the internal forum would be relegated the question of the justification of mercantile profits. Merchants who realized their gains because of contributions of costs, labor, and risk were morally free from censure. Although from a modern economist's point of view this Canonist analysis of profit has implications for their theories of the just price, the Canonists themselves did not make the connection between a price computed from these factors and the market price. For them the just price in the external forum was simply the current price, and the factors of costs, labor, and risk morally justified merchants' gains in the internal forum. The two analyses served two purposes and were unrelated. That the Canonists thought of their analysis of profits in terms of the confessional is further demonstrated by a second set of criteria for justifying profits. Mercantile gain should be based not only on costs, labor, and risk, but also on proper intentions. In the twelfth century the Decretists condemned profit based on motives of pure avarice (*ex cupiditate*), but exonerated gain sought for the purpose of providing for oneself and one's family. Intentions difficult of proof in an open court belonged clearly to the domain of the internal forum. In the thirteenth century the Decretalists repeated the same intentions but added the notion of an ethically justified and moderate profit (*moderatum lucrum*). This profit was to be regulated by a "good man" who by the time of Hostiensis was equated to the priest or bishop in the confessional. In the Canonist framework the just price and the just profit were kept separate by the external and internal forums.

The general prohibitions against speculation on the market were also within the province of the internal forum. The Carolingian capitulary *Quicumque* later adopted by Gratian attacked those who bought cheap in time of plenty and sold dear in time of dearth with the intention of making an avaricious profit (*propter cupiditatem*). It was the intention that was immoral and not the actual buying and selling, because in terms of the external forum both the low price in times of abundance and the high price in times of scarcity would be the current and hence the just prices. In the second half of the twelfth century the decretal *In civitate* of Alexander III renewed the prohibition against such speculation, but stated plainly that it was unenforceable in a public court of law because intentions are solely a matter between the individual and God. Only when

prices were grossly discrepant with the current prices, and thereby gave circumstantial evidence of intentions, did the Canonists of the thirteenth century attempt to enforce the antispeculation legislation in the external forum.

By means of the external and internal forums the Decretalists of the thirteenth century could reconcile, if not explicitly at least implicitly, the legacies of the Romanists and the earlier Decretists. When, as will be seen, the Canonist doctrines of freedom of bargaining and *laesio enormis* came under attack by the theologians, the Canonists explicitly related their Roman law conceptions of sale to the external forum and assigned the opposing theories of the just price of the theologians to the internal forum.¹³¹

5. THE THEOLOGIAN'S (TWELFTH AND THIRTEENTH CENTURIES)

Although the efforts of the medieval legists were prodigious, probably never did they surpass the accomplishments of their intellectual colleagues, the theologians. Theology was queen throughout the Middle Ages. While the chief center of activity for legal studies was the University at Bologna, the undisputed center for theology during the High Middle Ages was the University of Paris. Since its shadowy origins during the time of Peter Abelard in the early twelfth century, Paris attracted and formed the best theological minds of medieval Europe. Although the new surge in theology began early in the twelfth century, throughout the remainder of that century such theologians as Abelard, Gilbert de la Porrée, Peter Lombard, and Hugh of St. Victor applied themselves almost exclusively to speculative questions of metaphysics and philosophy. Around the 1160's Peter of Poitiers, who later became the dominating Regent of theology at the cathedral school of Notre Dame of Paris, probably expressed the current opinion of his colleagues when he stated that the doubtful questions of usury and the like should be left to the disputations of the Canonists.¹ It was not until the turn of the century when theology, while maintaining its developments in speculative issues, broadened its scope to include questions of a practical nature. Not until the beginning of the thirteenth century, when the theories of Roman and Canon law were already well advanced, did the theologians begin to consider the ethical problems involved in buying and selling. In theology the just price was an issue chiefly of the thirteenth century.

I. THE SYNTHESIS OF JUSTICE

Among the medieval thinkers the legists were naturally the most practical. Their approach was oriented

¹³¹ See below, pp. 69, 70.

¹ Peter of Poitiers, *Sententiarum* IV, 4, P.L. 211: 1152.

to the task of interpreting the law to provide a workable legal system. The Romanists and the Canonists labored to develop a series of techniques and devices which would produce a just and workable system of sale and price. The theologians, on the other hand, received their training in the more speculative disciplines of metaphysics and dogmatics. Fundamental first principles were the grist of their mills. Their task was to discover underlying causation and to relate all factors of experience to comprehensive and unified schemes of thought. The theologians were the thinkers who saw the broader implications of the just price and sale and attempted to synthesize the particular doctrines into a universal philosophy of justice.

There were several schemes available to the theologians for relating individual problems of sale and price to fundamental moral and theological principles. One scheme of organization was the concept of the "Seven Deadly Sins," which was well known to medieval men on every level of society. Among the most notorious of these seven was the vice of avarice, which the most learned scholar knew from his reading of revered authorities and the humblest peasant understood from the sculpture and glass of cathedrals. The medieval theologian sometimes considered the problem of the just price in relation to the vice of avarice.² Similarly the medieval moralist occasionally considered a breach against the just price as a sin against the law of God as contained in the Fourth Commandment of Moses: Thou shalt not steal.³ The most obvious manner, however, of interpreting the just price was that suggested by its title—as a particular expression of the general moral virtue of justice. Following this suggestion the medieval theologians related the doctrine of the just price to the general concept of justice.

The concept of justice was one of the dominating principles of the Middle Ages. Discovered in the revered writings of Antiquity, pronounced from the pages of Holy Scripture, depicted vividly in works of art of churches and cathedrals, the demands of justice were ever present to the medieval world. The word *justitia* implied an all-inclusive concept and could be applied to many levels of existence. It represented the theological justice of God, which was the supreme pattern for all earthly justice. It laid the basis of political theory, for without justice the commonwealth could not exist. Rulers and judges did justice in the courts of law. Justice, along with prudence, fortitude, and temperance, formed the four Cardinal virtues of the good life on earth. Finally, *justitia* represented the personal righteousness and holy piety of the Christian

experience. This great breadth and diversity of the concept of justice comprised a mass of unorganized and conflicting notions. The medieval idea of justice underwent a long and tortuous evolution before the concept finally arrived at a state of intellectual refinement where it could be rationally related to such practical affairs as just buying and selling. Before we can understand the general philosophical setting for the just price, we must briefly trace the refinement of the idea of justice in the twelfth and thirteenth centuries.

Pagan and Christian Antiquity provided the fundamental legacy for the medieval discussions of the concept of justice by defining the terms and presenting the problems with which the medieval thinkers were concerned. Stoic Classical culture epitomized the good life of man in four Cardinal virtues: prudence, justice, fortitude, and temperance. These virtues were assimilated into the writings of the Church Fathers and were combined with the three theological virtues of faith, hope, and love to form the seven principal virtues of the basic medieval moral code. By approval of the Church Fathers the Classical concept of justice entered the medieval system of ethics. Of all the Classical formulations of justice, that of Cicero was the most widely accepted in the twelfth and thirteenth centuries. In his *De officiis* Cicero discussed the four Cardinal virtues at some length,⁴ but his most influential definition of justice is found in his work on rhetoric: "*justice is a habit of mind which gives every man his desert while preserving the common advantage.*"⁵ This formulation was further assured of medieval acceptance when it was re-expressed five centuries later in the Institutes of Justinian as: "*Justice is the constant and perpetual will attributing to each his rightful due.*"⁶ In this manner Classical culture essentially defined justice as rendering to each one that which is his due and related it to the preservation of society. The Classical legacy to the Middle Ages was a socially oriented concept of justice.

The legacy of Christian Antiquity, however, introduced another interpretation of the conception of justice. When Jerome made his Latin translation of the Bible in the fourth century, he rendered the Greek word *δικαιοσύνη* by its current Latin equivalent *iustitia*. While in a special sense *δικαιοσύνη* does connote a justice which gives each his due, in its Biblical context it almost invariably means a "state of righteousness," a "condition acceptable to God," a "purity of life," a "holiness."⁷ When Jerome translated the beatitude, "Blessed are those who do hunger and thirst after righteousness (*iustitia*) for they shall be filled,"⁸ he was not referring to a special social justice. In its

² For example, Alanus of Lille listed under those sins committed *per avariciam*: ITEM si furtum, si rapinam, si vastationem agrorum et vinearum vel aliquo modo dampnum proximo fecisti. vel aliquod circumvenisti in aliqua negocia ratione in pondere vel mensura vel alio modo in venditione decipiendo. *De poenitentia*, Paris Bibl. Nat. Lat. 12312, fol. 304^{rb}.

³ As Peter Lombard had considered usury under this classification. *Sententiarum* III, 37, par. 3, P.L. 192: 832.

⁴ Cicero, *De officiis* I, 5, p. 16.

⁵ Cicero, *De inventione* II, 53, p. 329.

⁶ Inst. I, 1.

⁷ Cf. Thayer, Joseph H., *A Greek-English lexicon of the New Testament*, New York, 1898.

⁸ Matthew 5: 6.

Biblical context, *iustitia* was clothed with the very general aspects of personal righteousness. This theological conception of justice was further reinforced by a definition from Augustine. Although he was quite aware of the social formulation,⁹ he offered another statement of justice which was influential throughout the Middle Ages. Here justice was conceived as aiding the needy and submitting to God.¹⁰

The writers of the twelfth century fell heir to these diverse elements of the justice of Antiquity. Being more humanists than scholastics in their methodology, they merely perpetuated the various ancient conceptions and did little to clarify the inherent confusions. The theological and pietistic elements, for example, were emphasized in the famous definition of Anselm of Canterbury (d. 1109): "We therefore say that justice is rectitude of will, which has been observed for its own sake."¹¹ This idea of a righteous will (*rectitudo voluntas*) was of revolutionary importance in the development of medieval theology,¹² but it expressed little of the social nature of justice. Likewise on the theological side, Peter Lombard (d. 1160) adopted the definition of Augustine and increased its influence through the Middle Ages.¹³ On the other hand, the Classical and more social conception of justice was equally known. In many ways the twelfth century may be called the age of Cicero, as the thirteenth century is called the age of Aristotle. Abelard (d. 1142), for example, reproduced the terminology of Cicero,¹⁴ and even the mystical Hugh of St. Victor (d. 1141) revealed the Classical antecedents of his formula: "Justice is that through which the harmony of the community is held together, and which does not deny to each his merits."¹⁵ The admiration for Cicero of the twelfth century is best indicated by the *Moralium dogma philosophorum* (ca. 1153–1170) generally attributed to William of Conches. This ethical treatise was widely circulated throughout the twelfth and thirteenth centuries and chiefly consisted of an early scholastic redaction of the *De officiis* of Cicero. True to the Classical tradition justice was defined as the preeminently social-virtue: "Justice is the preserving virtue of human society and the common life."¹⁶ Under two divisions of *severitas* and *liberalitas* William discussed formally and at length the principles of justice.¹⁷ The influence of his treatise was considerable as is indicated by the large borrowings by such men as Gerald of Wales (d. 1223), Radulphus Ardens (fl. 1179–1215), and Vincent of Beauvais (d. 1264).

⁹ Augustine, *De libero arbitrio* I, 13, P.L. 32: 1235.

¹⁰ Augustine, *De trinitate* XIV, 9, P.L. 42: 1046.

¹¹ Anselm, *Dialogus de veritate*, 12, P.L. 158: 484.

¹² Cf. Landgraf, A. M., *Dogmengeschichte der Frühscholastik* 1: 37–39, Regensburg, Pustet, 1952.

¹³ *Sententiarum* III, 33, P.L. 192: 823.

¹⁴ Abelard, *Dialogus*, P.L. 178: 1653 and 1656.

¹⁵ Hugh of St. Victor, *De fructibus*, 13, P.L. 176: 1003.

¹⁶ *Moralium dogma philosophorum*, 12.

¹⁷ *Ibid.* 12 ff.

Because of the parallel perpetuation of the various theological and social elements, the features of justice during the twelfth century were generally confused. For example, Bernard of Clairvaux (d. 1153) could say with equal conviction both that justice was the virtue which gave to each that which was his due and that it was a righteous will which neither loves nor consents to sin.¹⁸ This general lack of analysis of the diverse elements of justice and rational organization of its component parts was best mirrored in the *Speculum doctrinale* of Vincent of Beauvais. Although living in the thirteenth century Vincent better represented the condition of the twelfth century when he quoted without distinction over seven different definitions of justice, including those of Cicero, Justinian, Hugh of St. Victor, and William of Conches.¹⁹ The twelfth century transmitted the elements inherent in justice; it did not try to systematize them.

Perhaps because of the general lack of rational organization of justice during the twelfth century, few men thought to trace the relationships of the principle of justice to the specific affairs of everyday life such as those of economic activity. Only the *Moralium dogma philosophorum*, imbued with the strong social orientation of Classical justice, noted the relationship between the broad principle of giving to each that which is his due and the ordinary activity of buying and selling. For the author of the *Moralium* justice was the great preservative virtue of society. Lands, possessions, and human exchange were not possible without the presence of justice. Especially was justice necessary for buying and selling, hiring and letting, and the mercantile life of the community.²⁰ By this slim suggestion the *Moralium dogma philosophorum* made the first step in the *rapprochement* between the ethical virtue of justice and the just price.

Towards the end of the twelfth and the beginning of the thirteenth century the disorder within the concept of justice was no longer tolerated. The theologians of this influential period began to analyze the basic elements inherent in justice, to arrange them in logical fashion, and to construct an intellectual edifice of justice which included all ramifications, including such practical theories as the just price. The synthesis of justice was one of the great achievements of the theologians of the thirteenth century. Two principal factors contributed to this development of justice. The one was an increasing amount of activity engaged in the solution of intellectual problems, which has been already noted in the fields of Roman and Canon law. The other was the entry of new Aristotelian writings and concepts into the medieval frame of reference. The first factor, although more subtle than the rediscovery of Aristotle, was probably more pervasive and in-

¹⁸ Bernard of Clairvaux, *De adventu Domini*, Sermo III, P.L. 183: 45, and Sermo LXXII, P.L. 183: 693.

¹⁹ Vincent of Beauvais, *Speculum doctrinale* IV, 30, p. 318.

²⁰ *Moralium dogma philosophorum*, 12.

fluent in the development of theological ideas. Around 1200 the universities of the preceding century began to bear fruit. A new generation of university-trained theologians made its influence felt in all areas of thought. These men schooled in the discipline of the dialectic were able to discuss the practical problems of ethics in the light of first principles of speculative philosophy.

Long before the penetration of Aristotelian concepts into medieval theology, these new theologians began to set themselves to the task of clarifying the concept of justice. They noticed the confusion and began to construct a hierarchy of divergent aspects. Many solutions were offered, and although their solutions differed slightly one from the other, they all attempted to systematize the elements of the concept. To Stephen Langton (before 1200) and later his student Godfrey of Poitiers (after 1200) the term *justitia* implied three levels of meaning. Most generally it was equivalent to virtue or righteousness. In the strictest sense it comprised judicial judgment, and in an intermediate position it signified giving to each his due.²¹ In a rather long passage William of Auxerre (d. 1231) distinguished between a general justice which embraced all virtue and a special justice which rendered to each that which was his due. Special justice included duties towards God, parents, inferiors, and superiors, and virtues of religion, piety, largess, respect, and veracity. Even the special definition of Augustine was included.²² This division into general and special justice became the prevalent manner of distinguishing the levels of justice. Chancellor Philip of Paris, (d. 1236) subdivided the virtue of justice even more thoroughly than his predecessors. Not only was the concept divided between general and special, but also between natural and supernatural, which included the "rectitude of will" of Anselm.²³ Other theologians such as the Franciscans Alexander of Hales (d. 1245), Jean de la Rochelle (d. 1245), and Odo Rigaldus (d. 1275), and even the Dominican Albert the Great (d. 1280), not yet influenced by the concepts of Aristotle, developed such divisions of justice.²⁴ All of these systems with only slight divergencies resembled the organization of Jean de la Rochelle: *Generaliter* justice is the righteousness of Anselm; *specialiter*, the social virtue of the *Moralium dogma*; *specialissime*, the judicial punishment of wickedness of Cicero, Abelard and the *Moralium dogma philosophorum*.²⁵

²¹ Stephen Langton, *Summa*, Paris Bibl. Nat. Lat. 16385, fol. 42 and Vat. Lat. 4297, fol. 37, in Lottin, *Psychologie et morale* 3: 287, n. 1.

²² William of Auxerre, *Summa aurea*, fol. 177-78, in *ibid.* 3: 288.

²³ Chancellor Philip of Paris, *Summa*, Bruxelles Bibl. Roy. 1801-03 (1551), fol. 144 and Paris Bibl. Nat. Lat. 16387, fol. 125, in *ibid.* 3: 291.

²⁴ For the texts of these men, cf. *ibid.* 3: 293-298.

²⁵ Jean de la Rochelle, *Summa de virtutibus*, Paris Bibl. Nat. Lat. 14891, fol. 69 and 70 and 15952, fol. 285, and Bruxelles Bibl. Roy. 12042-49 (1138), fol. 278 in *ibid.* 3: 294.

After this clarification of the elements of justice the theologians were better able to apply its principles to the more specific affairs of human existence. Profiting from the labors of his colleagues, Radulphus Ardens was able to relate even the doctrine of the just price to the general scheme of justice. Excerpting verbatim the passage from the *Moralium dogma philosophorum* which described justice as the preserver of society and the guardian of possessions,²⁶ he then discussed thirteen ways in which possessions could be justly acquired.²⁷ Among these was the means of just sale, and finally among the five requirements of a just sale was listed the factor of a just price.²⁸ As illustrated by the *Speculum universale* of Radulphus Ardens, a great chain of logical relationships connected the general virtue of justice with the practical obligation of a just price.

The second important factor in the synthesis of justice and its relation to the just price was the entrance of the Aristotelian concept of justice. This New Aristotle of the *Nichomachean Ethics* appeared on the medieval scene at a time when the theologians had already attained a high degree of systematization of the contents of justice. Aristotle was welcomed by such men as Albert the Great and especially Thomas Aquinas (d. 1274) as a tool for crystallizing definitively the medieval synthesis of justice. Book V of the *Nichomachean Ethics*, which contained the full Aristotelian discussion, did not make a decisive impact on medieval thinking until it was made available in the complete Latin translations of Robert Grosseteste (1246, 1247) and William of Moerbeke (ca. 1260). Both Albert the Great and Thomas Aquinas wrote commentaries to the book at an early date. After writing his commentary in 1266, Thomas included the chief Aristotelian concept of justice in *Pars secunda-secundae* of the *Summa theologiae* between 1271 and 1272. The *Summa*, therefore, represents the final presentation of the concepts developed in the commentaries and the best expression of the Thomistic-Aristotelian synthesis of justice.

The virtue of justice for Thomas was purely and simply that of Classical civilization formulated by Justinian's Institutes.²⁹ This virtue, which renders to each that which is his rightful due, does not concern the inner feelings of man, but rather the exterior deeds.³⁰ Since it pertains to human actions, which can, in a sense, be measured, justice is related to a mathematical ratio. This ratio might be best expressed by

²⁶ Radulphus Ardens, *Speculum universale* X, 31, Paris Mazar. 710, fol. 31^{va} & b.

²⁷ Possidentur autem iuste possessiones vel res a singulis per xiii causas: per invencionem, per hereditatem, per donum, per empcionem . . . etc. *Ibid.* X, 40, fol. 35^{va}.

²⁸ Item quando res emitur ab eo qui potest et debet vendere, et iusta intencione, iusta quia mensura, sed non iusto precio ut quando, scilicet, moneta non est iusta, iniusta empicio est. *Ibid.* X, 43, fol. 35^{va}.

²⁹ Thomas, *Sum. theo.* II, II, qu. 58, a. 1.

³⁰ *Ibid.* II, II, qu. 58, a. 9.

the term "mean" (*medium*), which implies a certain proportionality of things to people.³¹ Indeed, the whole underlying basis of justice of Thomas Aquinas might be summed up in the mathematical term, proportionality. Since justice consists of rendering to each that which is his rightful due, the proportional mean of justice is always related to the condition of that person to whom justice is rendered.³²

Aristotle, as we have seen,³³ probably divided justice into three basic parts. According to the Fifth Book of the *Ethics*, justice assuredly included distributive justice and corrective justice. Although not free from certain ambiguities, Aristotle probably intended to have a third or reciprocal justice which operated in the exchange of economic goods and combined elements of the first two kinds. In the translation of Aristotle's *Ethics*, William of Moerbeke used the Latin equivalents of *distributiva* for distributive, *directivum* for corrective, and *contrapassum* for reciprocation. Because of the ambiguities in Aristotle, both Albert and Thomas in their commentaries and Thomas in his *Summa* divided justice only into two categories: distributive (*distributiva*) and commutative (*commutativa*). Commutative justice, derived from the word *commutatio* or transaction, was clearly the same as Aristotle's corrective (*directivum*) justice. This two-fold division of justice of Albert and Thomas, which omitted reciprocation as a third category, has been decisive in influencing the commentators of Aristotle until modern times.³⁴

According to Albert and Thomas all particular justice is divided into two parts. As in Aristotle's scheme distributive justice concerns the relations between the whole society and the private individual. Society is often represented by people, such as princes, officers, etc., who by reason of their social position are superior to the private individual. Distributive justice governs the relations of things among these social superiors and private individuals and is a quantitatively unequal relationship. The mathematical mean regulating distributive justice is, therefore, a geometric proportion which gives each that which is his due, or just proportions of things to people unequal in status.³⁵ On the other hand, commutative (or corrective) justice regulates the relations of things to private individuals who are considered equal as individuals and not in relation to the whole.³⁶ This category may be further divided into involuntary and voluntary transactions. The former includes those activities in which one party forces an exchange on the other party by fraud or violence, as for example, by theft or seizure. Voluntary transactions

include exchanges between two willing parties such as sale, hire, deposit, etc.³⁷ Since the parties in commutative justice are considered equal in status, the mathematical mean or proportion which expresses this type of justice is an equality of things according to an arithmetic ratio.³⁸ In such commutative transactions, as Albert further elucidated, there is one who acts (*agens*) and wins the gain (*lucrum*) and one who receives (*patiens*) and suffers the loss (*damnum*). The role of the arithmetic mean of commutative justice is to find the quantitative mean between damage and gain.³⁹

Where does the activity of buying and selling fit into this comprehensive Aristotelian plan of justice as adopted by Albert and Thomas? Sale was preeminently a function of commutative justice.⁴⁰ The partners in such transactions were considered of the same status. As Albert clearly explained, in contrast to distributive justice, it did not matter whether one was industrious and the other lazy, or whether one was an emperor and the other a priest or a farmer.⁴¹ Furthermore, the activity of sale was placed under the voluntary exchanges of commutative justice.⁴² Both parties entered willingly into the contract—the one to transfer his ownership of a thing into the hands of another in exchange for an accepted price.⁴³ Since sale was a part of voluntary commutative justice, it would logically follow that the mathematical mean which expressed the justice of such a contract should be according to an arithmetic ratio. At this point appeared the great difficulty in the Aristotelian analysis of justice.

Although sale was a part of commutative justice because the partners were considered of the same status, goods could not be exchanged in sale on the basis of arithmetic equality of individual items because of the different values of goods. To use examples of Albert and Thomas, it would not be just to exchange a house for a bed or a house for a knife, because of the divergent values represented in the individual goods. This difference between the fundamental natures of corrective justice and economic exchange of goods probably induced Aristotle to make his third principal division of justice or Reciprocation.⁴⁴ Albert and Thomas, probably misunderstanding the somewhat ambiguous passage of Aristotle, held true to their two-fold divisions of distributive and commutative (or corrective) justice. Nevertheless they made the exchange of goods an exception to the normal mathematical operations of commutative justice. For Albert and Thomas the just mathematical mean which governed economic exchange

³¹ *Ibid.* II, II, qu. 58, a. 10.

³² *Ibid.* II, II, qu. 58, a. 11.

³³ See above, p. 11.

³⁴ Soudek, *Proc. Amer. Philos. Soc.* 96: 53, 1952.

³⁵ Thomas, *Sum. theo.* II, II, qu. 61, a. 1, and II, II, qu. 61, a. 2.

³⁶ *Ibid.* II, II, qu. 61, a. 1.

³⁷ *Ibid.* II, II, qu. 61, a. 3.

³⁸ *Ibid.* II, II, qu. 61, a. 2.

³⁹ Albert, *Ethica*, Lib. V., Tract. II, c. 6, in *Opera* 7: 350. Thomas, *Ethicorum*, Lib. V, Lect. 6, p. 261.

⁴⁰ Thomas, *Sum. theo.* II, II, qu. 61, a. 2.

⁴¹ Albert, *Ethica*, Lib. V, Tract. II, c. 6, in *Opera* 7: 349.

⁴² Thomas, *Sum. theo.* II, II, qu. 61, a. 3.

⁴³ Thomas, *Ethicorum*, Lib. V, Lect. IV, p. 254, 255.

⁴⁴ See above, p. 11.

was that of *contrapassum* or Reciprocation. Aristotle had conceived of Reciprocation as combination between the geometric and the arithmetic mean. Albert and Thomas described it not as an arithmetic equality of things to things (*aequalitas rei ad rem*) or a quantitative equality (*aequalitas quantitatis*), but rather a proportion (*secundum proportionalitatem*) between the different values of the goods exchanged.⁴⁵ In this definition *contrapassum* or Reciprocation conformed to the general requirement of proportionality fundamental to all relations of justice. In the final analysis sale was relegated to the general category of voluntary, commutative justice, because it concerned willing and equal parties, but it was regulated by the special mathematical relationship of Reciprocation.

Exactly how Reciprocation worked in the exchange of goods we shall examine later,⁴⁶ but both Thomas and Albert were emphatic as to the importance of Reciprocation for the existence of society. Over a century earlier, the *Moralium dogma philosophorum* of William of Conches had maintained that justice was essential for the mercantile world. This thesis was reiterated and elaborated a half century later by Radulphus Ardens. Finally, in the last half of the thirteenth century, Albert and Thomas, using Aristotle as further confirmation, restated the thesis with new force. Without reciprocal justice of exchange, human arts and crafts would be destroyed because they would lack sufficient compensation to maintain themselves.⁴⁷ A city, which was the unit of economic life based on the principle of division of labor, could not exist unless there was proportional exchange of goods. Without this reciprocal compensation, the losses incurred would eventually result in total enslavement of the citizen body, because a slave is one who is not justly rewarded for his work.⁴⁸ One might even say that a just exchange lay at the very basis of nature. Aristotle had said that man was a social animal by natural law. Just buying and selling was a reflection of this natural law, because man cannot exist without this just exchange.⁴⁹

After outlining the positive aspects of justice, Thomas Aquinas then turned in his *Summa theologiae* to the negative side of the question or to the subject of injustice. Injustices of the distributive category were summarily treated under the topic of unjust preferment. Those crimes against commutative justice were considered more extensively. Involuntary suffering of injuries included those committed by deeds (e.g. murder, mutilation, theft, and robbery) and by words either

in legal proceedings (e.g. unjust judgment, accusation, defense, witness, and advocacy) or in ordinary life (e.g. reviling, backbiting, tale-bearing, derision, and cursing). Injustices against voluntary commutative justice included fraud in sale and fraud in loans or usury. Within the section of fraud in sale (*Secunda secundae, Questio LXXVII*) Thomas was specifically concerned with the doctrine of the just price. As Radulphus Ardens had tried to do in a simple manner over fifty years earlier, Thomas Aquinas connected in a massive synthesis the universal principles of justice with the practical workings of the just price. Because of this relationship between price determination and justice, the theologians' analysis of economic affairs was to bear a characteristic stamp. Their chief purpose was not to inquire how prices were determined in actual practice, but what prices could be ethically justified. Viewing economics as a part of justice, they were fundamentally normative in their approach. As a part of moral theology their analysis was designed to be applied in practice to the internal forum or confessional.

II. THE JUSTIFICATION OF THE MERCHANT

A problem of larger consequence yet basic to the medieval consideration of the just price was the question of the moral position of the merchant. From the beginning of Patristic times the merchant's role in society was under suspicion. One of the important ethical problems of the Middle Ages, therefore, was to justify the position of the merchant. The interest taken in this question by the theologians is evidenced by the development in the thirteenth century of two literary forms devoted to the solution of this problem. The less important of the two was created in the commentaries to the *Sentences* of Peter Lombard. Prompted by the passage of the *Sentences* which stated that neither soldiers nor merchants could exercise their duties without sinning,⁵⁰ the commentators began to write a series of treatises which attempted to interpret this statement in order to justify the merchant. Some early attempts, as for example the treatises of Hugh of St. Cher (d. 1263)⁵¹ and a disciple of Odo Rigaldus,⁵² made only slight suggestions which differentiated merchants who used deceitful means from those who used honest means. By the second half of the century a definite literary type, which discussed the position of the merchant in full scholastic manner, developed out of these early suggestions. The commentaries on the *Sentences* of Thomas Aquinas,⁵³ Peter of Taren-

⁴⁵ Albert, *Ethica*, Lib. V, Tract. II, c. 9, in *Opera* 7: 355. Thomas, *Ethicorum*, Lib. V, Lect. VIII, p. 267. Thomas, *Sum. theo.* II, II, qu. 61, a. 4.

⁴⁶ See below, p. 73 ff.

⁴⁷ Thomas, *Ethicorum*, Lib. V, Lect. VIII, p. 268. Cf. a similar passage in Albert, *Ethica*, Lib. V, Tract. II, c. 7, in *Opera* 7: 353.

⁴⁸ Thomas, *Ethicorum*, Lib. V, Lect. VIII, p. 267. Cf. also Albert, *Ethica*, Lib. V, Tract. II, c. 9, in *Opera* 7: 356.

⁴⁹ Thomas, *Sum. theo.* I, II, qu. 95, a. 4.

⁵⁰ *Sententiarum* IV, 16, par. 2, P.L. 192: 878, 879.

⁵¹ Hugh of St. Cher, *In IV libros sententiarum*, Paris Bibl. Nat. Lat. 3073, fol. 128 and 3406, fol. 115.

⁵² Discipulus Odonis Rigaldi, *In IV libros sententiarum*, Paris Bibl. Nat. Lat. 3424, fol. 200.

⁵³ Thomas, *Commentum in libros IV sententiarum*, Lib. IV, Dist. XVI, Quaest. IV, Art. II, Quaest. 3, in *Opera* (Fretté and Maré) 10: 460, 61.

taise (d. 1276),⁵⁴ and Bonaventura (d. 1274)⁵⁵ all contained considerable discussions of the problem. The greatest achievement of the literary type was the lengthy treatise of Albert the Great. Apparently influenced by the earlier *Summa* attributed to Alexander of Hales, Albert offered five major arguments in behalf of merchants and listed three conditions of person, time, and place which might vitiate mercantile activities. This commentary was a full and reasoned defense of the moral position of the merchant.⁵⁶

The other literary form arising out of theological interest in the activities of the merchant is found among the *Summae theologicae* of the thirteenth century. As evidence of the vital currency of the problem three important theologians devoted scholastic discussions to its solution. The *Summa* attributed to the Franciscan Alexander of Hales asked, "Whether it is permitted to trade,"⁵⁷ the Cistercian Gui de l'Aumône (fl. 1250) considered the same question,⁵⁸ and the Dominican Thomas Aquinas phrased the problem as: "Whether it is permitted to trade, to sell something dearer than one has bought it."⁵⁹ More striking than the similarity of the problem posed is the basic pattern in which the three writers chose to develop their theses. In scholastic manner, arguments were collected against the principal proposition, which could later be refuted. The first of these "straw arguments" chosen by all three of the theologians was the spurious quotation from John Chrysostom which condemned mercantile activities as morally reprobate and unworthy of a Christian's devotion. The second of the arguments chosen by the three came from the passage of Cassiodorus, which stated that transactions (*negotium*) consisted fundamentally of buying cheap to sell dear and were the cause of sinful fraud. In opposition to these two attacks against merchants was marshalled the authority of Augustine. The three theologians selected the Augustinian commentary to *Quoniam non cognovi negotiationes*, which blamed the moral turpitudes of trade not on the mercantile practices themselves but rather on the sinful human nature of merchants. Employing this counter-attack of Augustine, the theologians proceeded to justify the activities of the merchant. The causal relationships between the treatises of Alexander, Gui, and Thomas may be difficult to determine, but one observation is evident. Either one or two or all of them found these Patristic passages from a common source, the *Decretum* of Canon law. These three quotations were

none other than the three Patristic *paleae* appended sometime before the close of the twelfth century side by side to the text of the *Decretum* at *Distinctio* LXXXVIII. Obviously someone had opened a copy of Gratian to this passage while he was discussing the functions of the merchant. Just as these same *paleae* had been influential in stimulating the Canonists' justification of the merchant in the twelfth century, so they played a similar role almost a century later.

Once the problem had been stated in this basic pattern, the *Summa* attributed to Alexander of Hales, Gui de l'Aumône, and Thomas Aquinas presented solutions which were different in form. The discussion of Alexander of Hales, which was the fullest and most penetrating, offered six arguments in behalf of the merchant including one from Aristotle, enumerated five modifying circumstances in trade (person, cause, manner, time, place, and participation), showed how these five conditions could be justly performed, and concluded by answering at great length the objections previously raised. Gui wrote the simplest treatise and most of his points were similar to those of Alexander. Thomas Aquinas based the greater part of his arguments on the authority of Aristotle.

Just as Canon law had been instrumental in posing the problem for the theologians, so the Canonists were important in influencing their solutions. As has been seen,⁶⁰ in considering the problem of profit acquired by usury, the Decretists of the twelfth century turned their attention to profit made in buying cheap and selling dear. They exonerated this gain from the accusation of usury and in the process justified mercantile profit as a result of labor, care, and expenses. Although the discussions of the theologians of the thirteenth century were more extensive and complex, at their basis they were constructed upon these fundamental theses of the Canonists. The three major writers of the Franciscan, Cistercian, and Dominican orders gladly accepted the aid offered by their Canonist predecessors.

The factor of mercantile profits was of utmost importance to the theologians in considering the role of the merchant. Might a man buy an article cheap and sell it dear and realize a profit? The theologians first distinguished between the functions of an artisan and a merchant. An artisan bought goods and through his skill and additional expenses improved the article, which he sold at a higher price. This profit was justified without any doubt by the additional labor and expenses, and was permitted to both the laity and the clergy.⁶¹ If a man, however, bought goods cheap and

⁵⁴ Peter of Tarentaise or Innocent V, *In IV librum sententiarum*, Dist. XVI, art. 3, 3: 172.

⁵⁵ Bonaventura, *Commentaria in librum IV sententiarum*, Dist. XVI, P.I, Art. IV, Quaest. II, in *Opera* 4: 402.

⁵⁶ Albert, *Commentarius in IV libros sententiarum*, Lib. IV, Dist. XVI, Art. 46, in *Opera* 29: 636-638.

⁵⁷ Alexander of Hales, *Summa theologica*, Pars II, Inquis. III, Tract. II, Sect. II, Qu. II, Tit. III, c. 1, 4(3): 721-724.

⁵⁸ Gui de l'Aumône, *Summa*, c. 131, Paris Bibl. Nat. Lat. 14891, fol. 208^{ra}-va.

⁵⁹ Thomas, *Sum. theo.* II, II, qu. 77, a. 4.

⁶⁰ See above, p. 39 ff.

⁶¹ Quidam vero emunt materias rerum et apponunt artificium suum et laborem ut inde faciant aliquod novum opus, ut illi qui emunt ligna vel lapides vel metallum. ut inde faciant vasa vel instrumenta necessaria usibus humanis. Alii emunt cora et pelles ut faciant calciamenta et manumenta. Tales non dicuntur mercatores sed artifices et bene licet eis vendere opera sua et artes suas quas magno labore addiscerunt dummodo non

sold them dear without any material improvement to the goods, he was a merchant in the fullest sense. His profits were justified upon consideration of several important factors.⁶²

From the beginning of the thirteenth century, when the theologians first considered the functions of the merchant, his commercial services were judged indispensable to society. These services consisted primarily of transportation and distribution of goods. Thomas Chabham (1215-1226) observed that merchants distributed from areas of abundance to regions of deficiency,⁶³ and Albert the Great reiterated this observation towards the end of the century.⁶⁴ In attempting to rehabilitate the moral position of the merchant from the original attack of Peter Lombard, the principal *Sentence* commentators, such as Peter of Tarentaise, Thomas Aquinas, and Bonaventura, insisted on the essential utility of merchants to society.⁶⁵ This general conception was reinforced by the authority of Aristotle, when his social and political ideas made their entrance into medieval thinking. In his *Politics* Aristotle pictured a society which was interdependent because of division of labor and for which mutual exchange of goods and services was necessary. His description of justice in the Fifth Book of the *Ethics* confirmed the necessity of this exchange.⁶⁶ The appearance of the *Politics* and the *Ethics* contributed the notion of the "naturalness" of trade and commerce to the already existing medieval conception of its valuable function. Alexander of Hales, referring frequently to the *Politics*, called such trade *connegotiatio* which supplied the mutual needs of an economically specialized society. Merchants, in conducting exchange fundamental to society, were performing duties of natural law.⁶⁷ Al-

bert the Great, reflecting the Fifth Book of the *Ethics*, noted that merchants were instituted for effecting commutative justice.⁶⁸

The height of Aristotelian influence on the medieval scholastic interpretation was expressed by Thomas Aquinas. Basing his justification of the merchant on a passage from the *Politics*, Thomas approximated in his *Summa* an Aristotelian distinction between two kinds of commerce.⁶⁹ The first consisted of an exchange of goods for goods or goods for money because of the necessities of life, and was natural and necessary to society. Men who participated in this exchange could be called more properly *oeconomici* or *politici* because they provided for the direct needs of their households or cities. The other exchange was between money and money or sometimes goods and money for the purpose of profit. Men who performed this kind of exchange were merchants (*negotiatores*) in the true sense. Under many conditions their profits could be rightfully condemned, but not necessarily for certain reasons. Important among these reasons was that merchants performed a public service to the country in supplying the necessary goods of life.⁷⁰ This service consisted chiefly in the transportation of goods from place to place,⁷¹ which Thomas enumerated elsewhere in a paraphrase of Aristotle as sea transport (*navigatio*), land transport (*devectio*), and local merchandising (*negotiatio*).⁷² By means of the Aristotelian analysis the theologians of the thirteenth century implanted the functions of the merchant into the very foundation of society and nature.

If the activities of commerce were necessary to society, what were the conditions which normally permitted merchandising profits? In the discussions of the theologians two categories were necessary for justifying commercial profit. The first of these considered the purpose of profits: How was the money to be used? The other concerned the origin of the profit: From what sources was the money earned? Since all were agreed that the merchant performed a vital social service, none could deny to the merchant the right of maintaining himself with profits gained from his services. In the first category of conditions concerning the purpose of profit the merchant was permitted to realize a gain in commerce for the necessary support of himself and his family. This justification was simply the former doctrine of *sibi et suis* of Huguccio.⁷³ To this the theologians added another just motive—that of giving money for charity. In an enumeration of just conditions necessary for sale, the *Summa* attributed to

faciant fraudem in artificio . . . quod clerici si pauperes sunt sicut ait canon bene possunt, et debent artificio victum querere et emere aliquam materiam in qua artificialiter operentur. . . . Thomas Chabham, *Poenitentiale*, c. 53, Paris Bibl. Nat. Lat. 3218, fol. 34^{va} and 3239A, fol. 133^{vb}. Alexander of Hales has a lengthy discussion of artisanship (minus proprie dicitur negotiatio) and the factors of materials and skill. *Summa theologica*, loc. cit. c. 2, 4(3): 725. Also, Thomas, *Sum. theo.* II, II, qu. 77, a. 4, ad 1.

⁶² *Negotiatio est emere aliquid vilius eo animo ut carius vendatur. hoc autem bene licet laicis etiam si nullam emendationem apponant rebus quas prius emerunt et postea vendunt.* Thomas Chabham, *Poenitentiale*, c. 53, Paris Bibl. Nat. Lat. 3218, fol. 34^{vb}, and 3239A, fol. 133^{vb}.

⁶³ *Aliter enim multus esset defectus in multis regionibus quia mercatores de eo quod habundat in uno loco usque ad alium locum in quo eiusdem rei est congestas deferunt.* *Ibid.*

⁶⁴ Albert, *Commentarius in IV sententiarum*, Lib. IV, Dist. XVI, Art. 46, in *Opera* 29: 636.

⁶⁵ Peter of Tarentaise, *In IV librum sententiarum*, Dist. XVI, art. 3, 3: 172. Thomas, *Commentum in librum IV sententiarum*, Dist. XVI, Quest. IV, Art. II, Quaest. 3, in *Opera* (Fretté and Maré) 10: 460. Bonaventura, *Commentaria in IV librum sententiarum*, Dist. XVI, Par. I, Art. IV, Quaest. II, in *Opera* 4: 402.

⁶⁶ See above, p. 11 ff.

⁶⁷ Alexander of Hales, *Summa theologica*, loc. cit., c. 1, 4(3): 722, 723.

⁶⁸ Albert, *Commentarius in IV sententiarum*, loc. cit., in *Opera* 29: 636.

⁶⁹ Thomas, *Sum. Theo.* II, II, qu. 77, a. 4. For the first redaction of this passage cf. *Politicorum*, Lib. I, Lect. VIII, p. 41.

⁷⁰ Thomas, *Sum. theo.* II, II, qu. 77, a. 4.

⁷¹ *Ibid.*, ad 2.

⁷² Thomas, *Politicorum*, Lib. I, Lect. IX, p. 44.

⁷³ See above, p. 41.

Alexander of Hales declared that a necessary and pious cause justifying commerce was to provide for oneself and one's family in necessities and to exercise works of mercy.⁷⁴ Gui de l'Aumône, probably influenced by Alexander, echoed the essential formulas.⁷⁵ Thomas Aquinas used the two motives of self-support and charity for lifting the moral opprobrium from *negotiores* or the merchants of his second classification. In this connection he used the term of moderate profit, which the Canonist William of Rennes formerly coined to characterize just commercial gains.⁷⁶ A final just motive for trading was the intention to contribute to public welfare by supplying the necessities of the community. On the other hand, as Huguccio had stated, if commercial gains were realized for the purpose of avarice or any other unworthy end, they could not be morally justified.⁷⁷ Such profits only became the unsatisfying food of *cupiditas* which knew no end and devoured eternally.⁷⁸

The second category of conditions concerned the economic sources or factors involved in commercial gain. The Canonists had formerly used the factors of labor and expenses to justify the earnings of artisans and craftsmen.⁷⁹ Such additional expenses and skillful labor produced improvements in the quality of the goods and permitted higher prices in the resale of the goods. The theologians, as well as the Canonists, used these two factors to justify a higher price in the exchange of goods in commercial transactions in which no material improvement had been added to the goods. Thomas Chabham, for example, stated that merchants could claim a return for expenses and labor they had contributed.⁸⁰ In fact, additions of *labor et expensae* seemed to be at the basis of any permissible economic gain or increment in the discussions of both the Canonists and the theologians.⁸¹

The economic factor to which the theologians paid the closest attention was that of labor. From the earliest times of the New Testament the importance of labor was stressed by Christian writers. "The laborer was worthy of his hire,"⁸² and "if any should not work neither should he eat,"⁸³ were phrases of the Gospels and the Apostle Paul, which were well circulated in the thirteenth century. Augustine had originally justified the merchant's profit on the basis of labor.⁸⁴ On innumerable occasions the theologians declared the necessity of adequately rewarding human labor. For example, in all cases of restitution for satisfaction in penance, whether it was in usurious contracts as explained by Thomas Chabham, or in other types of restitution as explained by Thomas Aquinas,⁸⁵ just compensation was necessary for all contributions of labor. Radulphus Ardens taught that one of the acts of justice was to give wages to hirelings and in terms of the Scriptures these wages were the reward for their labor.⁸⁶ What Radulphus claimed for hirelings, Thomas Aquinas claimed for all human efforts of labor. In his *Summa theologiae* he made the fair compensation of labor one of the positive acts of justice.⁸⁷ In another passage and in reference to the just wages of medical doctors the factors which should be considered were the condition of the person, the occupation, the labor, and the customs of the land.⁸⁸ In a commentary to Aristotle he also distinguished between skilled and unskilled labor.⁸⁹ The remuneration of labor was one of the affairs of justice, and for the opposite reason the practice of usury was unjust. Current was the idea that usurers were immoral because they accepted profits without working.⁹⁰ They were even making money while sleeping.⁹¹ In fact one of the criteria which

⁷⁴ Alexander of Hales, *Summa theologiae*, loc. cit., 4(3): 723, 24.

⁷⁵ Quando principalis eius intentio est circa publicam utilitatem, vel ut habeat unde sustentur ipse et familia sua. et unde possit dare pauperibus. Gui de l'Aumône, *Summa*, c. 131, Paris Bibl. Nat. Lat. 14891, fol. 208^{ra}.

⁷⁶ Thomas, *Sum. theo.* II, II, qu. 77, a. 4. For the discussion of William of Rennes, see above, p. 48.

⁷⁷ Alexander of Hales, *Summa theologiae*, loc. cit., 4(3): 722-24. Item ex circumstantia omne. ut cum propter cupiditatem vel aliquem malum finem negociari. . . Gui de l'Aumône, *Summa*, c. 131, Paris Bibl. Nat. Lat. 14891, fol. 208^{rb}.

⁷⁸ Thomas, *Sum. theo.* II, II, qu. 77, a. 4.

⁷⁹ See above, p. 39 ff and p. 47.

⁸⁰ Unde mercatores bene possunt percipere precium laboris sui et eventonis sue et expensas suas ultra sortem quam dederunt in emptione et etiam si mercibus apposuerunt aliquam emendationem, bene possunt precium percipere. Thomas Chabham, *Poenitentiale*, c. 53, Paris Bibl. Nat. Lat. 3218, fol. 34^{ra} and 3239A, fol. 133^{vb}.

⁸¹ Robert of Courçon offered a negative example of this principle. Unless one contributes a proportional amount to the expenses and labor of a partnership, he cannot acquire that proportion of the profits of the enterprise. *Summa*, in *Trav. et Mém. de l'Univ. de Lille* 10(30): 71, 73.

⁸² Luke 10: 7.

⁸³ II Thessalonians 3: 10.

⁸⁴ See above, p. 15.

⁸⁵ Credimus quod tenetur totum restituere potest iusta stipendia et iustum precium laboris sui. si forte pecuniam expendit ex colundo vineam illam, et alio modo laboraverit. Thomas Chabham, *Poenitentiale*, c. 120, Paris Bibl. Nat. Lat. 3218, fol. 70^{rb}, and 3239A, fol. 161^{rb}. Also, Thomas, *Commentum in librum IV sententiarum*, Dist. XV, Quaest. L, Art. 5, in *Opera* (Freté and Maré) 10: 384.

⁸⁶ Mercenariis nostris debemus mercedem suam reddere sine procrastinatione. . . . Non negabis mercedem indigenti, sed eadem dic reddes ei praemium laboris sui ante occasum solis. Radulphus Ardens, *Speculum universale* X, 22, Paris Mazar. 710, fol. 30^{ra}, and 709, fol. 192.

⁸⁷ Thomas, *Sum. theo.* I, II, qu. 114, a. 1.

⁸⁸ *Ibid.* II, II, qu. 71, a. 4.

⁸⁹ Thomas, *Politicorum*, Lib. I, Lect. IX, p. 44.

⁹⁰ Ad rusticum: facito aliquid operis. ut semper diabolus inveniat te occupatum sed usurarii qui laborare nolunt. nituntur contra apostolicum dicentem qui non laborat non manducat et contra ipsum qui dicit in sudore vultus tui vesceris pane tuo. Peter Cantor, *Distinctiones Abel*, v^o Labor, Paris Bibl. Nat. Lat. 455, fol. 72^{rb}.

⁹¹ Fenerator vult sequi lucrum sine omni labore, et in dormiendo. quod est contra preceptum domini qui ait: in labore et sudore tui vesceris pane tuo. Thomas Chabham, *Poeniten-*

often defined usury was the gaining of profit without labor.⁹²

In the light of the common opinion that all labor should be justly remunerated, it is not difficult to see how the theologians regarded commercial profits as just wages for the labor of the merchants. For this reason Thomas Aquinas termed mercantile gain as a stipend for labor (*quasi stipendium laboris*),⁹³ and his student Giles of Lessines (d. after 1304) included the remuneration of labor with just sale and just barter.⁹⁴ From a practical standpoint the element of labor could enter mercantile activities in various ways, but the theologians considered several principal types of labor performed by the merchant. The chief was the service of transportation, which was the *raison d'être* of the merchant in medieval opinion. Alexander of Hales left no doubt that the principal element of transportation and hence the principal justification of the profit of the merchant was the factor of labor.⁹⁵ Through this type of labor the merchant supremely served society. Another category of service was that of storage or care. Whether the theologians considered this as labor or not is not clear, but Alexander mentioned it immediately after the factor of transportation.⁹⁶ Closely connected with care or storage was the service of bearing risk. As we have seen,⁹⁷ in the later Canonists of the thirteenth century the factor of risk (*periculum*) became a just cause for increased prices in transactions of sale involving dangerous transportation. The theologians also reflected this tendency to consider the taking of risk as justification for profit. Alexander of Hales mentioned it in his discussion of care and storage, and Thomas Aquinas observed in his *Summa* that prices varied from place to place and from time to time because of risks involved in transportation.⁹⁸ In his commentary to the *Politics* he noticed that the greater risks of sea transportation also resulted in greater profits for merchants.⁹⁹ On the negative side, Giles of Lessines equated usurious practices as those involving neither labor nor risk.¹⁰⁰ In this loose fashion the factors of transportation, care, and risk were connected with the fundamental factors of labor and expenses as economic sources which morally justified the profit of a merchant.

For the moment one important observation should be made concerning these economic factors in general and that of labor in particular. In the context of the

theologians' discussions these factors were employed only to justify ethically commercial profits. As the Canonists so the theologians relegated their analysis of profits to the internal forum. Despite the logical connection between the elements of labor, costs, care, and risk and the doctrine of the just price, the theologians did not develop this relationship. As will be seen, they placed the just price principally on other foundations.

III. THE PROBLEM OF FRAUD

Despite the efforts of the medieval theologians to justify essentially the merchant and his activities, the profession of trade remained characteristically a sordid business. The chief reason for this general distrust among medieval religious thinkers, whether Canonist or theologian, was that commerce was more susceptible to harboring fraud and deceit in its activities than any other profession. To the moralist of the Middle Ages, of course, all forms of fraud should be avoided like the plague. In the vivid imagination of the celebrated preacher, Jacques de Vitry (d. 1240), the ordinary market place was flooded with all manner of deceit: "Cheating, fraud, lying, perjury, circumvention, and deception roam through all market places."¹⁰¹ With not quite as rich a vocabulary, the majority of the theologians reiterated a general condemnation of fraudulent trade.¹⁰² Even such writers as Alexander of Hales, Gui de l'Aumône, and Albert the Great, who wrote treatises justifying the merchant, were quick to denounce all kinds of cheating. Throughout the thirteenth century echoed and re-echoed the old Patristic formulas accusing the tradesmen of bad faith. The charge of Cassiodorus that merchants distributed their wares more by perjuries than by prices resounded in the writings of Stephen Langton¹⁰³ and Albert the Great,¹⁰⁴ and the condemnation of pseudo-John Chrysostom that the merchant cannot sell without lying and perjury was only timidly parried by Alexander of Hales¹⁰⁵ and Gui de l'Aumône¹⁰⁶ by adding the words: "that is, can scarcely sell."

Although all forms of fraud were righteously and unequivocally denounced by the theologians, the sober task of defining precisely what was fraud and how it

¹⁰¹ Jacques de Vitry, *Sermones vulgares*, Sermo 56, in Pitra, *Analecta novissima* 2: 435.

¹⁰² For example, even Roland of Cremona, who was not interested especially in the problem of the merchant: Item debet de yprocrita et de mercatore qui per mendacia vendit merces suas plus quam valent. . . . *Questiones super IV libros sententiarum* IV, Paris Mazar. 795, fol. 114.

¹⁰³ . . . merces suas plus periurio banerat quam precio. . . . Stephen Langton, *Summa de diversis*, Paris Bibl. Nat. Lat. 3236B, fol. 115. See above, p. 14.

¹⁰⁴ Albert, *Commentarius in IV sententiarum*, Lib. IV, Dist. XVI, Art. 46, in *Opera* 29: 637.

¹⁰⁵ Alexander of Hales, *Summa theologica*, loc. cit., 4(3): 723. See above, p. 38.

¹⁰⁶ Gui de l'Aumône, *Summa*, c. 131, Paris Bibl. Nat. Lat. 14891, fol. 208.

tiale, c. 118, Paris Bibl. Nat. Lat. 3218, fol. 68^{vb}, and 3239A, fol. 160^{va}.

⁹² Giles of Lessines, *De usuris*, c. 10, p. 596. Cf. Hagenauer, *Das "justum pretium,"* 26-30.

⁹³ Thomas, *Sum. theo.* II, II, qu. 77, a. 4.

⁹⁴ Giles of Lessines, *De usuris*, c. 4, p. 580.

⁹⁵ Alexander of Hales, *Summa theologica*, loc. cit. 4(3): 724.

⁹⁶ *Ibid.*

⁹⁷ See above, p. 52.

⁹⁸ Thomas, *Sum. theo.* II, II, qu. 77, a. 4, ad 2.

⁹⁹ Thomas, *Politicorum*, Lib. I, Lect. IX, p. 44.

¹⁰⁰ Giles of Lessines, *De usuris*, c. 10, p. 596.

related to the theory of the just price was more difficult. The theologians, however, were close to the intellectual tradition of the Romanists and the Canonists which had already made considerable progress in classifying and analyzing the various concepts and implications of fraud. Although even the legists were not always consistent in maintaining distinctions between the term *fraus* and the term *dolus*, in general they conceived of the whole problem under the subject of *dolus*. Defined as "any craft or deceit employed for the circumvention or trapping of another," *dolus* implied a conscious intention to deceive. The formula permitting freedom of bargaining (*licet contrahentibus invicem se naturaliter circumvenire*) was never interpreted in the sense of allowing buyers and sellers to cheat each other, but rather of allowing mistakes of judgment in setting the price. The words *circumvenire*, *decipere*, and *fallere* in this context never meant "to deceive" but merely "to be mistaken." These errors of estimation were classified as *dolus re ipsa*, *iniquitas*, or *fraus* to be distinguished from true or intentional *dolus*. Under no form did the medieval legists permit the presence of *dolus* in the setting of a price in a contract of sale.¹⁰⁷

The grammatical phrasing of the formula advocating freedom of bargaining could be misleading to those not familiar with the current legal interpretation. Occasionally the theologians not always well versed in Roman or Canon law misrepresented the legist opinion. For example, William of Auxerre in contrasting the human law system of *laesio enormis* and the divine law system of just price imagined that there was a difference between the two systems in regard to deception. In demonstrating the superiority of the divine law system he stated that no one could intentionally sell something for more than it was worth by means of lying without committing sin.¹⁰⁸ As a matter of fact, in human law also no one could sell intentionally at a higher price than the just price or by means of lies. A certain passage of the Canonist-theologian Monaldus, which reflected much of the terminology of William, also perpetuated this misinterpretation.¹⁰⁹ Human law, as well as divine law, did not countenance intentional fraud in the process of bargaining.

Not all the theologians can be accused of misrepresenting Roman and Canon law. On two occasions Thomas Aquinas quoted the formula of freedom of bargaining without giving evidence of misconstruing the legists' interpretation.¹¹⁰ In his discussion of the just price Thomas separated the element of fraud from the elements of sale without fraud. As in Roman or Canon law, if fraud, such as lying, resulted in a price above

the just price, the whole contract was immediately vitiated.¹¹¹ The final confirmation that Thomas really understood the legists of his day comes in his response to the civil law argument of freedom of bargaining. In explaining the Roman law remedy of *laesio enormis* he stated plainly that it operated only in situations apart from fraud (*absque fraude*).¹¹²

Despite the high degree of analysis in the conception of fraud among the medieval Romanists and Canonists, the theologians developed a system of classification which was somewhat independent of their legal colleagues. In a general way Radulphus Ardens conceived of *dolus* as pertaining to all forms of deception and particularly those which arrive by means of the mouth.¹¹³ *Fraus*, on the other hand, was distinguished as chiefly pertaining to outward deeds such as unjust weights and measures.¹¹⁴ These rather vague notions of Radulphus were made more precise in the *Summa theologica* of Thomas Aquinas. *Dolus* was defined as the general execution of *astutia* or craft which operated either through words or through deeds.¹¹⁵ In contrast *fraus* pertained more specifically to craft by means of deeds.¹¹⁶ In this manner the classification of *dolus* and *fraus* of the theologians was somewhat different from the system of the legists.¹¹⁷

IV. THE DOCTRINE OF THE JUST PRICE ACCORDING TO THE THEOLOGIAN

A. THE DOCTRINE BEFORE THOMAS AQUINAS

1. *The Just Price and the Conflict between Divine and Human Law*

Although the theologians borrowed from the Canonists certain moral concepts for justifying the position of the merchant, they did not feel obligated to accept all of the findings of their legal colleagues. A good example of a divergent point of view lies in the subject of buying and selling. During the thirteenth century the theologians developed a doctrine of price that stood in direct contradiction to the theories of the contemporary legists. The medieval Roman lawyers, as we have

¹¹¹ *Ibid.* a. 1.

¹¹² *Ibid.* ad 1.

¹¹³ *Dolum quoque pariunt. qui ad proximi deceptionem fit. quando. scilicet. aliud est in corde. aliud est in ore. . . . Simulator ore deceptit amicum suum. Homo huiusmodi duplicatur peccat. tum quia machinatur malum. tum quia simulat dolum. Simulata enim equitas. non est equitas. sed duplex iniquitas. Nulle si quidem infidie peiores quam occulte. Radulphus Ardens, *Speculum universale* XII, 60, Paris Mazar. 710, fol. 90^{rb}, and 709, fol. 306.*

¹¹⁴ *Fraudem quoque pariunt. Est autem fraus dupliciter exteriorum operum deceptorum. ut duplex mensura. duplex pondus. duplex usua. duplex iudicium. aliud sibi aliud aliis. Ibid.* XII, 61, fol. 90^{rb} and fol. 306.

¹¹⁵ Thomas, *Sum. theo.* II, II, qu. 55, a. 4, and ad 2.

¹¹⁶ *Ibid.* a. 5.

¹¹⁷ For a fuller treatment of the problem, cf. Fransen, *Le dol*, 99-101.

¹⁰⁷ For the Romanists' and Canonists' discussions of *dolus*, see above, p. 29 ff. and p. 54 ff.

¹⁰⁸ William of Auxerre, *Summa aurea* III, 21, fol. 225^{vb}.

¹⁰⁹ Monaldus, *Summa perutilis*, v^o de venditione, fol. 273.

¹¹⁰ Thomas, *Questiones quodlibetales* II, Quest. V, Art. 2, p. 32. *Sum. theo.* II, II, qu. 77, a. 1, obj. 1.

seen, developed from ancient Roman law a theory of sale in which adequacy of price was not necessary for the validity of a contract of sale. Freedom of bargaining within the limits of *laesio enormis* was the general rule. The Canonists, influenced by the great wave of new papal legislation, accepted the Roman law system, and freedom of bargaining within the limits of *laesio enormis* likewise became the official Canon law conception of sale. The theologians of the thirteenth century directly opposed their clerical colleagues, the Canonists, and insisted that the just price of a sale should be enforced.

Towards the end of the twelfth century, when the interests of the theologians were amplified to include moral problems of a practical nature, the term *iustum pretium* was employed with considerable frequency. Peter Cantor (d. 1197), for example, whose *Summa* concerned a great variety of practical problems, was actively occupied with many problems involving usury. In examining various contracts of sale which he believed to be usurious, Peter employed the term "just price" on numerous occasions to indicate the current and true value of the goods.¹¹⁸

The term "just price" was also used in the direct affairs of buying and selling. The theologians of the early thirteenth century began to develop the doctrine that all prices must represent the true value of the goods. Robert of Courçon (ca. 1204) cited the case of a sale contracted at a just estimation, which was distinguished from a contract of usury.¹¹⁹ Elsewhere in a list of illicit commercial practices he mentioned those merchants who were accustomed to sell their goods beyond the just price.¹²⁰ Finally he stated categorically that those who sold above the "owed price" (*debitum precium*) sinned mortally.¹²¹ His contemporary Stephen Langton (ca. 1200) was just as emphatic: Just as a creditor sins who accepts more than his loan, so a seller sins mortally who accepts more than the just

price.¹²² Radulphus Ardens, as we have seen, included the factor of a just price as one of the basic requirements for a just contract of sale.¹²³ This insistence upon the direct equivalence between the price and the true value of goods among the theologians continued into the High Scholastic period and achieved its fullest expression in the writings of Thomas Aquinas. Before him both Alexander of Hales and later Albert the Great enumerated various conditions prerequisite for morally justified contracts of sale. Among these requirements was a just manner of conducting sale, which consisted of selling goods at the just price.¹²⁴

The theologians also recognized that their particular doctrine contradicted the current theories of the legists. William of Auxerre, for example, realized that buyers and sellers could be mistaken in the price, and that in human law this error could be remedied only if it was beyond one-half the just price. In contrast divine law permitted no sale of goods for more than the just price.¹²⁵ Thomas Chabham recognized the general features of the secular legal device of *laesio enormis*.¹²⁶ In another passage he stated categorically that although human law required restitution only if the price was beyond one-half the just price, divine law demanded restitution even if the mistake were a mere penny.¹²⁷ This divergence between the doctrine of the legists and the theologians was noticed first by the theologians at the beginning of the thirteenth century. Towards the middle of the century the Canonists on their part also seemed to be aware of the difference of opinion. Their first expressions of disagreement were not too clear. William of Rennes, in a discussion of restitution be-

¹²² In venditione et in mutuo transfertur dominium rei vendite et mutui. in venditione iustum precium vendici recipiendum est. in mutuo tantum quantum mutuo datur. Sicut ergo venditor peccaret mortaliter si plus iusto precio acceperet et in mutuo si plura reciperet quam mutuo dedit. Stephen Langton, *Questiones*, de usuris, Paris Bibl. Nat. Lat. 16385, fol. 108^{va}.

¹²³ Item quando res emitur ab eo qui potest et debet vendere et iusta intencione iusta quia mensura sed non iusto precio ut quando. scilicet. moneta non est iusta. iniusta empicio est. Porro moneta est iusta quando est probata. quantum ad materiam et ad pondus est publica. id est. usualis. Radulphus Ardens, *Speculum universale* X, 43, Paris Mazar. 710, fol. 35^{va}, and 709, fol. 202. With Radulphus, however, the chief element of a just price seems to be the factor of a just monetary basis. See below, p. 81.

¹²⁴ For the passages of Alexander and Albert, see below, p. 71.

¹²⁵ William of Auxerre, *Summa aurea* III, 21, fol. 225^{vb}.

¹²⁶ Preterea dicit lex secularis quod nulli venditori licet recipere pro rebus venditis ultra medietatem iusti precii et tamen peccatum est si aliquid recipit ultra iustum precium. Sed lex taxat medietatem iusti precii quia tunc primum emptor qui deceptus est potest repetere quicquid ultra medietatem iusti precii persoluit. Thomas Chabham, *Poenitentiale*, c. 53, Paris Bibl. Nat. Lat. 3218, fol. 34^{va}, and 3239A, fol. 133^{rb}.

¹²⁷ In venditione autem secundum humanas si aliquis deceperit aliquem ultra medietatem iusti precii tenetur restituere illud quod ultra medietatem recipit. sed si minori quantitate decipit emptorem non tenetur restituere. sed secundum legem dei si decipit emptorem in uno denario ultra iustum precium tenetur restituere. *Ibid.* c. 120, fol. 70^{rb} and fol. 161^{vb}.

¹¹⁸ For example: Item nota quod si solvat quis pecuniam in summa pro recipienda re in futuro. et ideo remittit venditor aliquid de iusto precio: manifesta usura est. Peter Cantor, *Summa*, Paris Bibl. Nat. Lat. 9593, fol. 138^{va}. Defraudavit enim verum dominum iusto precio. cum posset habere ad terminos maiorem pecuniam. si autem venditor recipiat pecuniam ad terminos. et ita maiorem pro expectatione sua pecuniam recipere quam domus valeat in presenti. et ita vendit expectationem suam: ergo fenerator est. Quid fiet in hoc casu? Respondeo, taxetur iustum precium domus secundum presentem statum. et solvatur sive ad terminos sive similiter. et neuter committet usuram. *Ibid.*, de usura, fol. 149^{vb}.

¹¹⁹ Si autem secundum iustam estimationem fiat venditio. tunc capitale quod datur pro prioratu ponatur sub dubio casu. mercimonia erit et non usura. Robert of Courçon, *Summa* VIII, 27, Paris Bibl. Nat. Lat. 3258, fol. 59^{ra}, and 14524, fol. 41^{rb}.

¹²⁰ Eadem est questio de mangonibus seu cocionibus et aliis mercatoribus qui ultra iustum precium solent merces suas vendere. *Ibid.* X, 9, fol. 69^{ra} and fol. 48^{vb}.

¹²¹ Ergo si aliquis decipit proximum ultra debitum precium vendendo mercedem suam, peccat mortaliter. *Ibid.* X, 18, fol. 72^{ra} and fol. 51^{rb}.

cause of mistake in sale which was less than the limits of *laesio enormis*, referred to two laws: the law of the external forum (*ius fori*) and the internal forum (*ius poli*). One of these laws required restitution of this minor injury and the other did not, but William was not clear which was which.¹²⁸ Innocent IV also mentioned the two laws, and in his discussion it seemed clearer that the external forum referred to civil law which permitted mistakes in price to the limits of *laesio enormis* and the internal forum to the theological principle of constant remedying of mistakes in price.¹²⁹ Another version of the fourteenth century of this passage of Innocent IV seems to confirm this interpretation.¹³⁰ The later Canonists, therefore, by distinguishing between the external and internal forums were apparently aware of the theological attack upon the current legal theories of price.

2. The Problem of Estimation

Although the theologians before Thomas Aquinas employed the term *iustum pretium* with considerable frequency, with two important exceptions none has been found who directly explained what was meant by the term. What was the true value of goods? What was the nature of the just price? How was it determined? seemed to be questions which the theologians did not consider in their discussions. Although they realized that the obligation of enforcing a full just price in all contracts of sale was relatively strange to the contemporary Romanists and Canonists, perhaps they felt that the actual estimation of the value of goods was a device too well known to be commented upon. Perhaps this is the chief reason for the relative silence of the theologians concerning the problem of estimating prices. The theologians lived in a social and legal context in which the problem of estimating prices was an everyday occurrence. As has been demonstrated, the legal basis in both Roman and Canon law for evaluating the just price of goods was the current price. The price for which goods sold at a certain time and in a certain place either under free competitive or officially regulated conditions was the just price or true value of those goods.¹³¹ Possibly this was also the method which the theologians had in mind when they referred so often to the term.

If the theologians were referring to the current price, a preliminary necessity to this theory was the recognition that prices varied according to time and place—a recognition which underlay the discussions of the medi-

eval Romanists and Canonists. The theologians likewise realized this basic character of prices and included it occasionally in their treatises. Peter Cantor, for example, in a chapter on monetary theory and the prince's power to regulate currency concluded that in transactions all prices should be determined according to time and place and paid in equivalent terms.¹³² Robert of Courçon mentioned in connection with a just sale that a merchant should observe the course of sale which varied according to time and place.¹³³ And Jean de la Rochelle mentioned the regional factor in judicial estimations concerning usury.¹³⁴

The theologians were also aware of the normative role of current prices in many kinds of affairs. In the *Summa* of Peter Cantor, which is rich in information of contemporary social conditions in Paris around the end of the twelfth century, is an account of the position of an estimator (*apreciator*) who was an official of the royal court. The duty of this man was to buy provisions for the royal household, and in exercise of this function he was given authority to set at will the price of the goods he purchased. Peter Cantor was especially concerned with the moral implications of his office. If the official went to the market and forced prices on merchants which were lower than the current level, was he not robbing the merchants? If, however, he set the values at prices currently offered, the functions of his office were at least morally tolerable. In any case, the normative or true value of goods was the current price.¹³⁵ Robert of Courçon used another example of the current price, which was closer to equating it with the just price. In describing the activities of a just sale, he cited the case of a merchant who possessed goods which were valued at ten shillings and on which the merchant's own labor was estimated at twelve pennies. The merchant was permitted to wait and

¹³² Credimus quod determinandum est precium et quantitas precii secundum tempus sicut secundum locum. ut si vendas mihi aliquid in anglia pro .c. solidis. teneor tibi reddere .c. solidos similes lingorum quandocumque reddam et ubicumque. Ita ratione temporis quandocumque solvas: teneris reddere .c. solidos illius precii cuius erant tempore contractus. Peter Cantor, *Summa*, Paris Bibl. Nat. Lat. 9593, fol. 168^{ra}.

¹³³ For the text, see below, p. 71, n. 136.

¹³⁴ Quod estimat vir sapiens et bonus secundum consuetudinem regionis in qua fit contractus. . . . Jean de la Rochelle, *Summa de vitiis*, de usura, Paris Bibl. Nat. Lat. 16417, fol. 154^{vb}.

¹³⁵ Aliquis princeps habet officium in curia sua quod vocant apreciatum. et dicitur apreciator ille qui potest imponere precium quod voluerit rei emende in emptione ciborum prelati. et iurat talis apreciator quod fideliter amministrabit officium illud. Cum ergo venit ad forum: accipit a mercatore pro duobus solidis. quod posset vendere pro tribus. Est ne illud rapina? An est de iuris et redditibus prelati? Si autem daret tantum quantum alius vellet dare: tolerabile esset. Sed nunc si ille apreciator querat in confessione salutem anime sue. consulatur immo percipietur ei quod si velit salvare animam suam relinquat officium illud? Preterea quid est fideliter amministrare officium illud? an imponere precium quod imponebatur quando minus valebat? Nonne affectus hominum faciunt et mutant rei precium? Peter Cantor, *Summa*, Paris Bibl. Nat. Lat. 9593, fol. 141^{ra}.

¹²⁸ William of Rennes, *Glossa*, to *debet remove: Summa Raymundi* II, 7, par. 8, p. 235. The same passage may be found in Monaldus, *Summa perutilis*, v^o de usura, fol. 289.

¹²⁹ Innocent IV, *Apparatus*, to *promittunt: X: V*, 19, c. 6, *In civitate*, p. 337.

¹³⁰ Guido de Baysio, *Rosarium*, to *Causa X*, q. 2, c. 2, *Hoc ius*, p. 203.

¹³¹ For the Romanists, see above, p. 29. For the Canonists, see above, p. 54.

observe the course of market prices which varied according to time and place. When he discovered a market on which he could sell his goods for eleven shillings, he was allowed to do so, since that market price was presumably the just price which compensated him for his labor.¹³⁶

The clearest indication that the theologians before Thomas Aquinas accepted the prevailing view of the legists concerning the current price comes from the direct statements of the *Summa* attributed to Alexander of Hales and Albert the Great. These two writers of the High Scholastic period defined the just price completely in terms of the current price. Alexander of Hales phrased it as: ". . . and by a just estimation of the goods, and by trade, just as it is sold commonly in that city or place in which the sale occurs."¹³⁷ Albert's definition was: "A price is just which can equal the value of the goods sold according to the estimation of the market place at that time."¹³⁸ The phrase *communiter venditur* of Alexander reflected directly the terminology prevalent in both the Romanists and the Canonists. In further explanation of his theory, Alexander cited a situation of a man who engrossed or bought up all the goods on a certain market. Possessing monopoly powers, he sold these goods on the same market at a price higher than the competitive market price (*carius . . . vendant quam venderetur in foro, si ipsi non emissent*).¹³⁹ This type of engrossing, of course, was generally condemned, but the important indication here is that the normal current price was the standard or just price. Albert elucidated his definition by giving an example of restitution of gains made from fraudulent selling. In all such restitutions the true value of the goods was always that of the common market price (*secundum forum commune*).¹⁴⁰ As the medieval legists, so the medieval theologians before Thomas Aquinas equated normative value with the current price. In the last analysis the quarrel between the theologians and the legists over the just price was not how the just price was to be determined (both parties accepted the current price), but whether it was to be enforced in all contracts or not.

In both Roman and Canon law during the Middle

Ages a frequent device for making judicial estimations of monetary values was the judgment of a "good man" (*arbitrium boni viri*), a man who was impartial in the affair and competent to make an intelligent decision. The theologians were concerned with numerous problems in which a judicial estimation of the value of goods was required. Many examples may be cited from assessments in usurious contracts and problems of restitution to show that the theologians also employed the *arbitrium boni viri* for appraising true values.¹⁴¹ In the matter of contracts devoted to sale where the just price should have been present, William of Auxerre stated that there was no general skill (*ars*) for calculating prices for all times and all places, but the individual just price should be estimated in all its particular circumstances (*in singulis*) by a "good and wise man."¹⁴² If it is true that the theologians considered the current price to be the just price, it may be assumed that the function of the "good man" who evaluated prices in countless occasions of usury, restitution, and sale was to determine precisely what was the actual going price of the goods at the time and place of the original contract. A good man was one qualified to know the current price.

B. THOMAS AQUINAS AND THE DOCTRINE OF THE JUST PRICE

The majority of modern studies on the medieval concept of the just price begin their treatment of the problem with Thomas Aquinas. Certainly Thomas is the most important of the scholastics, but also, because of the progress of publishing sources, he has been the earliest of the great scholastics generally available to modern scholars. As has been abundantly demonstrated, Thomas was not the first of the theologians to advocate the enforcement of a complete just price (as opposed to the half just price of the legists), but perhaps he was the first to discuss the problem at considerable length. From an over-all view of the Thomistic writings, it appears that the purpose of Thomas was to give theoretical justification of the doctrine rather than practical directions for its operation. Thomas does not tell his readers in terms of everyday economic experience how they are to determine the just price of a certain article. His main intention appears to be a philosophical justification of a doctrine

¹³⁶ Quod concedimus dicentes quod mercator debet attendere cursum venditionis secundum statum terre et temporis et laborem quem circa mercem impendit. et si valet merces sue .x. solidos et estimative credat, quod pro labore suo debeat recipere .xii. denarios. potest pro undecim solidis vendere sine iuramento et fraude. et si subest vicium in re? illud detegat emptori. si vero aliter vendat mercem suam ad deceptionem proximi causa cupiditatis. peccat mortaliter et tenetur ad restitutionem omnium eorum que ultra debitum precium et debitum laborem recepit. Robert of Courçon, *Summa* X, 18, Paris Bibl. Nat. Lat. 3258, fol. 72^{ra} and 14524, fol. 51^{rb} & ^{ra}.

¹³⁷ Alexander of Hales, *Summa theologica*, loc. cit. 4(3): 723.

¹³⁸ Albert, *Commentarius in IV sententiarum*, Dist. XVI, Art. 46, in *Opera* 29: 638.

¹³⁹ Alexander of Hales, *Summa theologica*, loc. cit. 4(3): 724.

¹⁴⁰ Albert, *Commentarius in IV sententiarum*, Dist. XVI, Art. 46, in *Opera* 29: 638.

¹⁴¹ Sufficiat ei quod recipiat pecuniam salvam ad arbitrium boni viri recurrendum est. Peter Cantor, *Summa*, de restitutione, Paris Bibl. Nat. Lat. 9593, fol. 110^{vb}. licebit ei recipere casualem proventum. et hoc dicit ei arbitrium boni viri. *Ibid.* quod estimat vir sapiens et bonus secundum consuetudinem regionis in qua fit contractus. et secunda quod solet accidere in aliis annis de valore mercium consideratis omnibus circumstantiis. . . . Jean de la Rochelle, *Summa de vitiis*, de usura, Paris Bibl. Nat. Lat. 16417, fol. 154^{vb}. Venditor debet alii restituere quantum fuit in precio super estimationem viri boni. . . . *Ibid.* fol. 155^{vb}. William of Auxerre, *Summa aurea* III, 21, fol. 225^{rb}.

¹⁴² *Ibid.*

already well known. Thomas' writings were occupied with the problem of relating the individual concept of the just price to the universal philosophy of justice. Aristotle was his principal tool for effecting this synthesis, and Thomas' discussions revolve principally around the pivot of the Aristotelian concept of justice and economic exchange.

The general setting for the just price is *Questio* LXXVII of *Secunda-secundae* of the *Summa theologiae* in which Thomas treated the question of fraudulent practices in buying and selling. Previously he had elaborated the idea of justice and then had set about to discuss those practices which were against justice. Fraudulent sale according to *Questio* LXXVII consisted of injuries against voluntary, commutative justice.¹⁴³ Injustice in sale arose from four sources which Thomas treated in four articles: from the price (art. 1), from two kinds of injustice arising from the merchandise (art. 2 and 3), and from the skill of the merchant (art. 4).¹⁴⁴ Perhaps they will appear more logical if they are considered in reverse order. The last article asked whether a merchant could buy cheap and sell dear. As has already been seen from an analysis of this section,¹⁴⁵ Thomas firmly agreed with the Canonist tradition that the profits of merchants were justified on the basis of labor and expenses. The two prior articles (2 and 3) dealt respectively with the questions of whether a sale was illegal because of a defect in the merchandise and whether a seller was obligated to reveal any defects in the goods on sale.¹⁴⁶ To Article 3 Thomas replied that a seller was required to reveal hidden defects in the goods, and to Article 2 Thomas distinguished between defects of kind, measure, and quality which might vitiate a sale. The striking characteristic about these two articles was their obvious similarity to Roman law. Thomas' answer in Article 3 was essentially Romanist, and in Article 2 his categories, and even his examples, are those of Roman law.¹⁴⁷ Having permitted merchants to buy cheap and sell dear and thus to include their profit in the price, and having explained the relation between the qualities of goods and their value, Thomas turned to the question of price: was it permitted to sell a thing for more than it was worth? In this setting Thomas treated the question of the just price.

1. The Conception of the Just Price

Inheriting the tradition of the preceding theologians Thomas Aquinas in Article 1 of *Questio* LXXVII declared in unmistakable terms the doctrine of the enforcement of the full just price: "And therefore if the

price exceeds the quantity of value of the thing, or conversely if the thing exceeds the price, the equality of justice is destroyed."¹⁴⁸ To fulfill the demands of equitable justice the contract price and the true economic value of goods must be equivalent.

In order to develop a case for the just price in scholastic manner Thomas listed three objections or "straw arguments." One of these arguments protested that whatever was common to all men was also natural and not sinful. Since Augustine, confirmed by a Biblical statement, had observed that all men wish to buy cheap and sell dear, this human tendency must be natural. It is, therefore, permitted to sell dearer or buy cheaper than the thing is worth.¹⁴⁹ To this objection Thomas answered that although a practice may be common to all men, it can be nonetheless sinful, and he cited the example from Augustine where the just price was paid.¹⁵⁰ Another objection against the just price was deduced somewhat obscurely from a statement of Aristotle on utility and friendship.¹⁵¹ The first objection, and judging from the length of Thomas' response, the most important objection, came from Roman law. As his predecessors, Thomas Aquinas was also aware of the conflicting system of sale advocated by contemporary legists. In presenting this objection he quoted one of the medieval adaptations of the standard legal formula sanctioning freedom of bargaining.¹⁵² In responding to this objection, Thomas went beyond the treatments of his predecessors by explaining the relation between human law and divine law. Human law is not able to prohibit everything that is against perfect virtue; rather, it is content to punish only those gross faults which destroy the bonds of society. As Thomas explained elsewhere, minor sins such as the fixing of hard bargains are difficult to detect because everybody wishes to buy cheap and sell dear.¹⁵³ Even human law, Thomas continued in the *Summa*, corrects excessive injustices such as prices set beyond the limits of one-half the just price. In contrast, divine law, which leaves nothing unpunished contrary to true virtue, demands always that complete justice be observed in contracts of buying and selling.¹⁵⁴ As the earlier theologians, Thomas realized fully that his doctrine of enforcement of the just price stood in opposition to the Romanists and Canonists of his day.

After having drawn up the objections in array, Thomas opposed them with the authority of the Golden Rule of the Gospel: Do unto others what you would have them do unto you. Since no one wishes to have

¹⁴⁸ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, Resp.

¹⁴⁹ *Ibid.* obj. 2.

¹⁵⁰ *Ibid.* ad. 2. For the Augustinian background see above, p. 15.

¹⁵¹ *Ibid.* obj. 3.

¹⁵² *Ibid.*, obj. 1. The Roman law formula was also used elsewhere: *Questio quodlibetalis* II, Qu. V, Art. 2, obj. 1, p. 32.

¹⁵³ *Ibid.* p. 33.

¹⁵⁴ Thomas, *Sum. theo.* II, II, qu. 77, ad 1.

¹⁴³ See above, p. 63.

¹⁴⁴ For a convenient English translation of *Sum. theo.* II, II, qu. 77, see Monroe, *Early economic thought*, 53-64.

¹⁴⁵ See above, p. 64 ff.

¹⁴⁶ *Sum. theo.* II, II, qu. 77, a. 3 is also the subject of a *Quaestio quodlibetalis* II, Quaest. V, Art. 2, p. 32, 33.

¹⁴⁷ Cf. Spicq, *La justice*, 324.

things sold to him at unfair prices, no one should sell to another at a price greater than the true value.¹⁵⁵ Three principal elements follow and form the case of Thomas Aquinas in defense of the doctrine of the just price. In the first place the question of fraud in sale was dispensed with summarily. If conscious fraud produced a sale at a price higher than the just price, the contract is vitiated and must be remedied. If fraud is eliminated, the problem of sale and the just price may be considered in two manners.¹⁵⁶ The second element of the just price considered the substance of sale, or sale according to itself (*secundum se*). In a short and concise passage Thomas condensed the whole Aristotelian philosophy of economic exchange and reciprocal justice as interpreted by Albert the Great and himself. This conception of justice was at the very core of the doctrine of the just price.¹⁵⁷ Finally under the third element, he considered the activity of sale from its secondary qualities (*per accidens*) and developed some modifications of the fundamental idea of justice of exchange.¹⁵⁸

2. The Analysis of Justice of Exchange

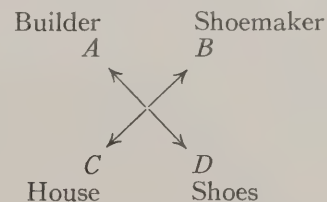
The second element of Thomas Aquinas' discussion of the just price in the *Summa theologiae* was outlined in a rigorously logical form: The exchange of buying and selling considered according to itself is introduced for the common utility of each person so that one exchanges with another what he has for what he needs and *vice versa*. Since this exchange is instituted for the common utility, one party should not incur more damage than the other, and there should be an equality of goods, for which the contract was instituted. The value of goods is determined by their human use and is measured according to a given price, for which purpose money was invented. If the price exceeds the value of the goods, or if the value of the goods exceeds the price, the equality of justice is violated. Therefore, if one sells goods dearer or buys goods cheaper than their true value, this transaction is substantially (*secundum se*) unjust and illicit.¹⁵⁹ This small *exposé* of justice and the just price was succinct and condensed a world of interpretation into a few words. To understand completely its full sense, it will be necessary to examine its theoretical foundations.

The literary source underlying this passage was obviously the *Commentary* of Thomas on the *Nicomachean Ethics* of Aristotle, which in turn was influenced by the *Commentary* to the same work by his teacher Albert the Great. As has already been examined at length,¹⁶⁰ the ideological context for economic

exchange was the conception of justice. The exchange of buying and selling was a part of voluntary and commutative justice. It constituted an exception to the division of commutative justice, because the mathematical ratio which determined its relations was not arithmetic equality, but rather proportional reciprocation or *contrapassum*.

The basic problem of economic exchange for Aristotle and his medieval commentators was how to find a just proportion or reciprocation between goods which have different values. The ratio of arithmetic equality cannot be used, as for example, the item of a house cannot be exchanged for the item of a shoe, because of different values expressed in the two items. How then do the builder and the shoemaker exchange their unequal products in a just reciprocation (*contrapassum*)? Interpreted in the light of modern mathematical theory, Aristotle probably solved the exchange of goods of unequal value by dividing the problem into two mathematical processes: the determination of the relative positions of want satisfaction of the goods, and the equalization of these two positions in exchange. In determining the relative positions of value of the goods, he used the geometric ratio of distributive justice. In equalizing the two positions he employed the arithmetic ratio of commutative justice. In this manner Aristotle combined the ratios of distributive and commutative justice to form the ratio of reciprocation in economic exchange.¹⁶¹

Although the solutions of Albert and Thomas were not as mathematically refined as this modern interpretation of Aristotle, nonetheless they were thoroughly founded on the Aristotelian discussion. Using the example of Aristotle of an exchange between a builder and a shoemaker,¹⁶² they conceived of the problem in practical terms. Obviously a solution was necessary, which was based on the proportional value of the two items.¹⁶³ In imitation of Aristotle, the solution was presented schematically by a parallelogram in which the corners *A* and *B* represented the builder and the shoemaker and the corners *C* and *D* represented their products the house and the shoes respectively:



The justice of reciprocation demanded that the house and the shoes be exchanged proportionally according to the terminology of Albert,¹⁶⁴ and by means of a

¹⁵⁵ *Ibid.* Sed contra.

¹⁵⁶ *Ibid.* Resp. For the discussion of fraud, see above p. 68.

¹⁵⁷ *Ibid.*

¹⁵⁸ *Ibid.* See below, p. 79 ff.

¹⁵⁹ *Ibid.*

¹⁶⁰ See above, p. 61 ff.

¹⁶¹ See above, p. 11 ff.

¹⁶² On other occasions Albert and Thomas used the example of an exchange between a farmer and a shoemaker.

¹⁶³ Albert, *Ethica*, Lib. V, Tract. II, c. 9, in *Opera* 7: 355.

¹⁶⁴ *Ibid.* p. 357.

diagonal conjunction according to the terminology of Thomas.¹⁶⁵ If an exact exchange of equivalent values was not performed the foundations of economic exchange would be undermined and society could no longer exist. This solution was merely analogical and schematic and did not explain the underlying mathematical ratios which modern commentators have found in the discussions of Aristotle. The fundamental principle of the discussions of Albert and Thomas was that just reciprocation was a proportional exchange of goods according to an equality of value. This proportional equality was the equality necessary for a just price to which Thomas referred in his *Summa*.¹⁶⁶

In some respects this Aristotelian principle of the equal exchange of value in just economic transactions was similar to the Canonist principle of usury. A Carolingian canon contained in the *Decretum* of Gratian and of great importance in the Canonists' discussions defined usury as demanding from a loan more than what is given.¹⁶⁷ The accepting of interest violated strict equality of exchange, since the creditor received more value than the debtor. Stephen Langton noticed a similarity between unjust exchange in loans and in sale. Just as the creditor violated the equality of exchange by accepting interest, so did the unjust seller by accepting more than the just price.¹⁶⁸ Thomas Aquinas also mentioned this parallel in his *De malo*. One who exacted more than the just price was as one who exacted usury. In both cases equality of value was disregarded.¹⁶⁹

If reciprocation was a proportional exchange of goods according to an equality of value, what constitutes this value? On what basis was the house of greater value than the pair of shoes? Aristotle had answered this question somewhat simply by stating that it was human need or demand.¹⁷⁰ Faithful to the Aristotelian text both Albert and Thomas also declared that human need or want (*indigentia*) was the basis of the value of goods in exchange. In a preliminary manner, human want was the occasion for exchange. Without mutual needs men would not exchange their goods. The shoemaker would not exchange a quantity of shoes for a house unless he had need for the house. Division of labor and the resulting mutual wants were the underlying impetus for exchange.¹⁷¹ Human wants also served as the measure of exchange. As Thomas stated it, the various products of different skills needed a universal measurement to make them commensurable. By this one standard of measurement they could be

compared, evaluated, and exchanged according to the principle of equal values.¹⁷² It is impossible to discover this necessary universal standard of value from the natural properties of the goods themselves. As Augustine had thought, too many confusions arise from the consideration of natural qualities of goods, as for example, a mouse is of a higher natural order than a pearl, but is of less economic value.¹⁷³ In place of the natural properties of the goods, the true natural standard of value was need. Human want was the one measure which was necessary to make all economic goods commensurable, comparable, and exchangeable. Both Albert and Thomas repeated this Aristotelian concept constantly throughout their commentaries to Book Five of the *Ethics*.¹⁷⁴ Albert explicitly related the measurement of human need to the factor of utility (*utilitas*) which was the means of satisfying need.¹⁷⁵ Furthermore, following the suggestion of Aristotle, Albert and Thomas claimed that the instrument of money was invented in order to give a numerical statement to human need. Currency was the conventional means instituted by society for expressing the natural standard of value.¹⁷⁶ The true price of goods was only the monetary expression representing the capacity of satisfying human need in the goods. A certain measure of grain, for example, possessed a higher price than the pair of shoes because it satisfied a greater need.¹⁷⁷ This theory of value Thomas later reproduced in the *Summa theologiae*.¹⁷⁸

By declaring that human want was the true and universal standard of value of exchange, Albert the Great and Thomas Aquinas were completely Aristotelian in their analysis. The two medieval commentators, however, did not stop at that point. Beginning with Albert, the two theologians added a second basis which was foreign to the text of Aristotle. Value was also based upon the factors of labor and expenses (*labores et expensae*). In the example cited above where products differed in exchange value, Thomas and Albert stated that these differences of value were due, first of all, to the abilities of the goods to satisfy need, and secondly to the amounts of labor and expenses expended in their production.¹⁷⁹ For example, a house was worth more than a pair of shoes because of the greater

¹⁷² *Ibid.* p. 270.

¹⁷³ Albert, *Ethica*, Lib. V, Tract. II, c. 10, in *Opera* 7: 360. Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270, 271. For the discussion of Augustine, see above, p. 15.

¹⁷⁴ Albert, *Ethica*, Lib. V, Tract. II, c. 9, in *Opera* 7: 355. *Ibid.*, c. 10, p. 358. Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270, 271.

¹⁷⁵ Albert, *Ethica*, Lib. V, Tract. II, c. 10, in *Opera* 7: 359. ¹⁷⁶ *Ibid.* c. 10, p. 360. Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270, 271.

¹⁷⁷ *Ibid.* p. 270. Albert, *Ethica*, Lib. V, Tract. II, c. 10, in *Opera* 7: 357, 358.

¹⁷⁸ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, Resp.

¹⁷⁹ Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270, 271. Albert, *Ethica*, Lib. V, Tract. II, c. 10, in *Opera* 7: 358.

¹⁶⁵ Thomas, *Ethicorum*, Lib. V, Lect. VIII, p. 268.

¹⁶⁶ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, Resp.

¹⁶⁷ *Causa* XIV, q. 3, c. 4, *Usura*. See above, p. 35, n. 36.

¹⁶⁸ For the text, see above, p. 69, n. 122.

¹⁶⁹ Thomas, *De malo*, qu. 13, ar. 4, ad. 7, in *Opera* (Fretté and Maré) 13: 546. Cf. the conclusion of Endemann, *Studien* 2: 4, 5.

¹⁷⁰ See above, p. 12.

¹⁷¹ Albert, *Ethica*, Lib. V, Tract. II, c. 10, in *Opera* 7: 359. Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270, 271.

labor and expenses entailed in its production.¹⁸⁰ In just reciprocation, goods should be exchanged in proportion to an equality of labor and expenses. The reason of Albert and Thomas for including this new standard of value in their analysis was very clear. A just exchange is necessary for the existence of society because it must justly remunerate the various skills of society for their expenditures of labor and expenses. If the various skills are not justly compensated for their production, they will not exchange their goods and society cannot continue to exist.¹⁸¹ Although the satisfaction of mutual needs was the promoting occasion for exchange of goods, the remuneration of labor and expenses was also essential for a just exchange. According to the *Commentaries* of Albert and Thomas, economic goods were exchanged in proportion to an equality of value which was determined by two sets of standards: human need and the productive factors of labor and expenses.

The addition by Albert and Thomas of the new factors of labor and expenses to the former Aristotelian factor of need has prompted a lively controversy in modern studies.¹⁸² Most modern commentators agree that Albert and Thomas added new factors but they divide over the question of what influence these factors had in the total medieval analysis. Did they replace the Aristotelian analysis of value or merely supplement it? Modern scholarship has been largely influenced by the study of Edmund Schreiber, which divided the factors of value into two general categories: the "subjective" or need value of Aristotle and the "objective" or labor and expenses of Albert and Thomas. Although Schreiber recognized the presence of the subjective factors in the Thomistic analysis,¹⁸³ he, nonetheless, felt that Thomas placed greater emphasis on the objective factors of labor and expenses.¹⁸⁴ Need or utility merely served to compensate costs and labor. Schreiber concluded that Thomas never really connected the "objective" and "subjective" elements in his system,¹⁸⁵ and in this conclusion he was supported by Otto Schilling.¹⁸⁶ On the other hand, the emphasis which Schreiber placed on the "subjective" factors was vigorously disputed by Selma Hagenauer. She claimed that by adding the objective factors of labor and expenses Thomas thereby renounced the subjective theories of Aristotle.¹⁸⁷ The factor of need was used by Thomas only in the sense of a hypothesis of exchange and not

a measure of worth.¹⁸⁸ The great importance of Thomas' new objective elements was that he revolutionized economic theory. No longer were goods evaluated subjectively by need, but by means of an objective cost-of-production theory. Labor was the prime factor in producing economic value, and Thomas Aquinas was a precursor of Karl Marx.¹⁸⁹

The arguments presented and challenged by the many participants in the controversy have been based chiefly on the writings of the Church Fathers, Thomas Aquinas, and the later scholastics, and only occasionally on the writings of preceding or contemporary medieval thinkers. Perhaps more light may be introduced into the controversy of what Thomas really meant by the just price if we place him in the preceding and contemporary context of Roman law, Canon law, and theology.

3. Thomas Aquinas and the Current Price

It cannot be emphasized too strongly that in the *Summa theologiae*, in which is found the latest discussion of the subject, Thomas Aquinas does not state in practical terms exactly what comprised the just price.¹⁹⁰ His purpose in the *Summa* was to summarize and modify a philosophical background for the just price previously developed in the *Commentary to the Nichomachean Ethics*. Why did not Thomas make a statement in everyday terms of what precisely was the just price? Did he feel that such a statement would have been too obvious to the medieval reader? If such an attitude is possible, then Thomas must be examined from the point of view of his preceding and contemporary context.

The preceding and contemporary Romanists and Canonists, although not intending to enforce a full just price in contracts of sale, conceived of the true value of goods as the current price at the specific time and place of sale. While it is true that Thomas rejected the specific legist doctrine of freedom of bargaining within the limits of *laesio enormis* for the doctrine of enforcement of the just price, did he thereby also reject the legal foundation for estimating economic goods? Thomas seemed inclined to accept other Roman law ideas such as the effect of defects in goods on sale. Even more important it has been shown that the theologians preceding Thomas, although objecting to the Roman and Canon law principle of freedom of bargaining, accepted the legists' method of estimating true value by the current price.

The theologians directly after Thomas and often dependent on him also advocated the current price as the just price. For example, Giles of Lessines, a direct student of Thomas and whose work *De usuris* until recently has been included among the works of

¹⁸⁰ *Ibid.* c. 9, p. 357. *Ibid.* c. 10, p. 359. Thomas, *Ethicorum*, Lib. V, Lect. VIII, p. 268.

¹⁸¹ *Ibid.* Lect. IX, p. 270.

¹⁸² For the most complete bibliography in German of the controversy to its date (1939) see: Schachtschabel, *Der gerechte Preis*, 83, n. 43.

¹⁸³ Schreiber, *Die volkswirtschaftlichen Anschauungen*, 43, 73.

¹⁸⁴ *Ibid.* 63, 64.

¹⁸⁵ *Ibid.* 45, 62-64.

¹⁸⁶ Schilling, *Die Staats- und Soziallehre*, 255, 256.

¹⁸⁷ Hagenauer, *Das "justum pretium,"* 1.

¹⁸⁸ *Ibid.* 42.

¹⁸⁹ *Ibid.* 13-16.

¹⁹⁰ Spicq, *La justice*, 334.

Thomas, treated the problem of just estimation. Although in his definition of the just price Giles included such philosophical notions as natural law, human custom, and utility, reminiscent of the Thomistic discussions, yet in the final analysis the just price was the price for which goods could be sold at the time without fraud.¹⁹¹ The "wise or good men" who were to make a judicial estimation of the true value of goods were simply to recall the current price. From the end of the thirteenth century to the end of the Middle Ages a considerable number of prominent scholastics, such as Henry of Ghent (d. 1293), Richard of Middleton (fl. 1300), Jean Buridan (d. 1358), and Antonius of Florence (d. 1459), to name only a few, generally accepted the current price as the just price.¹⁹² If numerous theologians both before and after Thomas, as well as the Romanists and Canonists, had accepted the current price as the true value of goods, might not Thomas himself have meant this doctrine? Is it possible that the discussions of the *Summa* and the *Commentary to the Ethics* were none other than a theoretical justification of the current price?¹⁹³

In basic terms the current price may be defined as the actual price of certain goods at a certain time and place. It would include both free competitive prices and legal prices regulated by justly constituted officials. It would exclude, however, prices determined artificially through private monopolistic practices such as forestalling, engrossing, and regrating.

If Thomas Aquinas clearly equated the current price with the just price, we should expect that his theoretical justifications would be in harmony with the characteristics of the current price. One principal difficulty prevents this conclusion. In his *Commentary to the Ethics* he stated that in just reciprocation goods were exchanged proportionally according to equal value. In his *Summa* he said that the price must equal the value of the goods, which was another way of expressing the same thing. In his *Commentary* he further explained that the value of goods was determined both by human need and by labor and expenses. The first criterion is consonant as a theoretical background for the current price, but the second theory needs further elaboration than what Thomas offered to harmonize with the current market price. If the value of economic goods consisted chiefly of labor and expenses, then the just price was not found directly from the going price,

which was dependent also on other factors, but rather from the calculation of the labor and expenses which went into the production of the goods. For this reason Hagenauer and others have claimed that the just price of Thomas Aquinas was the cost-of-production price.

In considering these "objective" factors of labor and expenses in Thomas' analysis of value, several preliminary considerations should be made. Of importance is the fact that Thomas used the factors of labor and expenses only in his earlier *Commentary to the Ethics*. In Article 1 of Question LXXVII of the later *Summa* which represented the final formulation of his thought this "objective" analysis of values was omitted. In the *Commentary* not all references to the factor of labor were intended by Thomas to be an analysis of economic value. For example, in his explanation of justice he uses the factor of labor to illustrate the workings of the geometric mean in distributive justice. He states that if Socrates worked two days and Plato worked one day, then Socrates' earnings should be twice as much as Plato's.¹⁹⁴ As stated plainly in the rubric to the passage, the chief purpose of this example was to illustrate the functioning of the four terms in the geometric mean, and not to give a labor theory of value, as some have maintained.¹⁹⁵ Aristotle himself had offered a similar example of the functioning of the geometric proportion in the division of common property.¹⁹⁶ In other passages Thomas used the factor of labor in the same manner.¹⁹⁷

It is nonetheless true that principally in *Lectioes VIII* and *IX* of the *Commentary to the Ethics* Thomas seems to have used the factors of labor and expenses to analyze the nature of economic value. Perhaps our understanding of the significance of these two factors will be aided, if we recall their origins in medieval economic theory and attempt to place Thomas' discussion in this context. Quite obviously in his treatments of exchange and economic value Thomas received the two "objective" elements from his master Albert the Great, who had employed them previously in the same manner, but the history of the two elements goes back to earliest Christian times. From the very beginnings of the Church Fathers artisans and craftsmen had been permitted their profits on the basis of labor and expenses. As we have seen, Augustine allowed profits to merchants, who performed no material improvement to their wares, as a compensation for labor.¹⁹⁸ In the twelfth century the Decretists, working on the problem of gain and usury, also justified the mercantile gains on the basis of *labores* and *expensae*.¹⁹⁹ The theologians,

¹⁹¹ Giles of Lessines, *De usuris*, c. 8, p. 588. Also *ibid.* c. 9, p. 591.

¹⁹² Cf. Schreiber, *Die volkswirtschaftlichen Anschauungen*, 133, 141, 182, and 218.

¹⁹³ Several modern students have supported the view that the just price of Thomas was essentially the current price. Their evidence for this conclusion, however, has been chiefly found from sources subsequent to Thomas. Sandoz, *R. thomiste* 45: 295, 1939; Höffner, *Wirtschaftsethik und Monopole*, 73, 74; de Roover, *Quar. Jour. Econ.* 65: 496, 497, 1951 and 69: 164, 165, 1955; Schumpeter, *History of economic analysis*, 93; and Noonan, *Scholastic analysis of usury*, 82-89.

¹⁹⁴ Thomas, *Ethicorum*, Lib. V, Lect. V, p. 258.

¹⁹⁵ Hagenauer, *Das "justum pretium"*, 15, 16.

¹⁹⁶ Aristotle, *Nicomachean ethics*, Bk. V, 1131b.

¹⁹⁷ Thomas, *Ethicorum*, Lib. V, Lect. IV, p. 256.

¹⁹⁸ See above, p. 15.

¹⁹⁹ See above, p. 39 ff.

represented best by Thomas himself in the *Summa*, accepted completely the Canonists' case for the merchants.²⁰⁰ In the fullest medieval context, therefore, the two factors of labor and expenses became the justification *par excellence* of all commercial profits.

Closely connected with the justification of commercial profit was the medieval conception of the role of the merchant in society. By the twelfth and thirteenth centuries both the Canonists and the theologians considered his service of transporting goods as an important contribution to the life of society. This conception was further reinforced by the introduction of Aristotelian ideas which envisaged society characterized by division of labor and in which the exchange of goods performed by merchants was a natural necessity. A just exchange was indispensable for remunerating merchants for their social services. Since, as the Canonists had taught, profits should be based on the factors of labor and expenses, a just exchange must assure an equivalence of labor and expenses. This connection of factors is why both Albert and Thomas stated so explicitly that a just exchange must be an equal exchange of labor and expenses so that society can continue to exist.²⁰¹ In implicit economic terms Albert and Thomas were maintaining that without equivalence of value exchange will not take place. In other words, goods will not be produced permanently below cost. We should notice, however, that this statement is not a cost-of-labor theory of value, but merely an affirmation of the social and economic necessity of remunerating labor. Despite logical affinities, neither the Canonists nor the theologians based their determination of the just price explicitly on the factors of labor and expenses.²⁰²

If, on the other hand, Thomas Aquinas had wished to present a theoretical defense for the current price, he could have hardly chosen a better means than the theory of value of Aristotle. The idea that the value of economic goods was determined by their capacity for satisfying human want has been fruitful in economic thought in explaining current market prices. Utility, as it may be called, presents a psychological explanation that supports the function of demand of buyers in the general process of supply and demand. Both Albert and Thomas were not only aware of this Aristotelian theory of value, but they also advocated emphatically its fundamental principles. The *Commentaries* of Albert and Thomas frequently reiterated that human need was not only the hypothesis of all exchange, but also the one universal measure of all exchange. To give numerical expression to this basic factor of need, human society invented the device of money, and therefore, all prices

were in reality the representation of human need or utility.²⁰³

The *Commentary to the Ethics* of Thomas which contained this Aristotelian theory of value was probably written in 1266. In 1271 and 1272 when Thomas wrote the *Secunda-secundae* of the *Summa theologiae*, he summarized and re-expressed the essential findings of his former *Commentary*. In the short passages of the *Summa* where Thomas condensed the whole theory of just exchange, when he arrived at the logical point of value, he reproduced not the factors of labor and expenses, but rather the Aristotelian theory of human need or utility: "The value of economic goods is that which comes into human use and is measured by a monetary price, for which purpose money was invented."²⁰⁴ As was often characteristic of Thomas in the *Summa*, he supported the concept of Aristotle by quoting the authority of Augustine.²⁰⁵ The value of goods, as Augustine had said, came not from natural properties but rather from human use.²⁰⁶ Viewed from the full perspective of both the *Commentary* and the *Summa*, Thomas definitely accepted the Aristotelian theory of value of want satisfaction or utility and offered a psychological theory consonant with the theoretical demands of the current price.

More positive and concrete evidence, however, can be found of Thomas' complete acceptance of the current price theory. In 1262 he replied to Jacopo da Viterbo, a lector of the Dominican monastery in Florence, concerning cloth bought by Tuscan merchants at the Fairs of Champagne. Dealing with an actual case in the cloth trade, he referred to the market price as the normative price with which fraudulent, usurious contracts of sale were to be compared.²⁰⁷ Moreover, in his later and more theoretical writings Thomas observed and noted without condemnation certain peculiar characteristics of current market prices which he would have been compelled to condemn if he had advocated a cost-of-production theory. He noted the salient factor that they vary according to time and place, although admittedly in this context the observation is closely

²⁰³ For the complete discussion, see above, p. 74.

²⁰⁴ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, Resp. Hagenauer places great importance on the term *pretium datum*. She admits that this term is the price determined by human need or the current price. She equates, however, this *pretium datum* with the *pretium* of the following sentence which was opposed to the true value (*quantitatem valoris*) or the just price. In this manner, she makes the just price and the current price opposing terms. On the other hand, if one admits that the passage of Thomas in question is a greatly condensed summary of ideas already elaborated in the *Commentary to the ethics*, one cannot attach great significance to this particular identification of terms. Cf. Hagenauer, *Das "justum pretium,"* 51-56.

²⁰⁵ Schreiber, *Die volkswirtschaftlichen Anschauungen*, 73, 74.

²⁰⁶ Thomas, *Sum. theo.* II, II, qu. 77, a. 2, ad 3.

²⁰⁷ Thomas, *De emptione et venditione ad tempus*, in *Opera* (Fretté and Maré) 28: 465. A better text and English translation may be found in O'Rahilly, *Irish Eccles. Rec.* (5th Series) 31: 165, 1928.

²⁰⁰ Thomas, *Sum. theo.* II, II, qu. 77, a. 4. See above, p. 64.

²⁰¹ Albert, *Ethica*, Lib. V, Tract. II, c. 9, in *Opera* 7: 357. Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 270.

²⁰² Cf. Schumpeter, *History of economic analysis*, 91.

connected to risk of transportation.²⁰⁸ He noticed the influence of supply and demand on various economic phenomena. The relative abundance or scarcity of goods in different places influenced the size of measurements customary to these places. For example, where grain was more abundant the customary measurements for calculating the grain tended to be of larger dimensions than in places where grain was more scarce.²⁰⁹ This particular passage does not specifically refer to the factor of supply influencing prices, as some commentators have suggested,²¹⁰ but Thomas in other passages did record his observation of the influence of the supply of goods on the level of prices. In paraphrasing a passage of Aristotle's *Politics*, he described without condemnation the case of a skilled merchant who profited from the price levels which were different in various areas because of varying supplies of goods.²¹¹

Lest it is objected that in this passage Thomas was merely explaining and not approving of Aristotle's account, he also included in his *Summa* a positive endorsement of a case in which a merchant made an unusual profit from differences in supply and demand. In this example Thomas raised the problem, with which Cicero had formerly dealt in the *De officiis*, of the merchant who was carrying grain to a famine-stricken locality and who also knew that other merchants were following him with more supplies of grain. Was the merchant obligated to tell the famished inhabitants that more grain was on the way and thereby decrease the price for his own grain, or could he keep silent about the other supplies and sell his grain at the higher emergency rate?²¹² Among the various solutions offered by Cicero was that of the Stoic philosopher who replied that the merchant was bound by duty to tell the truth and sell at a lower price.²¹³ Thomas, however, stated that since the arrival of the other merchants was a future event and uncertain, the merchant was not obligated by the demands of justice to mention the arriving competitors. He could sell his own grain at the prevailing price, which in this case was extremely high. If, of course, the merchant wished to tell of the arriving supplies, he would be more virtuous, but he was not obligated by justice.²¹⁴ In the last analysis one could say that the current price (*pretium quod invenit*) was actually the just price (*non videtur contra iustitiam facere*). This particular example of Thomas is of great interest because it was included in the *Summa theologiae* and represents

his last word on the subject. It logically excluded any explicit theory of a cost-of-production price.²¹⁵

A final characteristic of the just price mentioned by Thomas in his *Summa* also suggested a current price. After discussing the relationship between divine law and civil law, and after noting that even civil law did not permit free bargaining beyond the limits of *laesio enormis*, he stated that the just price of divine law should also be allowed a certain flexibility. The just price could not be fixed precisely (*punctualiter*) but consisted of a rough estimation which could vary a little in each direction without violating the equality of justice.²¹⁶ From the context of Roman law it seems possible that Thomas saw a certain similarity between the legist theories of price and those of his own. The doctrine of Roman law, as he noted correctly above, permitted a rather large "playroom" (*ultra dimidiam iusti pretii*) in which buyers and sellers could set their own bargains. The theological doctrine, on the other hand, narrowed this freedom to a minimum flexibility around the just price (*modica additio vel minutio*). There was a significant difference between the legal and theological theories, but it was a difference of degree and not of kind, because of the fluctuating nature of the current price on which both theories were founded.

From the total perspective of the writings of Thomas Aquinas there is a suggestion of an evolution within the doctrine of the just price. In his *Commentary to the Ethics*, Thomas considered both the cost of production and the current price as possible bases for the just price. When, however, he wrote the *Secundae secundae* of the *Summa theologiae* five or six years later he definitely decided for the current price.²¹⁷

²¹⁵ Cf. the conclusion of Saporì, *Studi* 2: 265-303. Cf. also the review article of Lopez, *Jour. Econ. Hist.* 8: 63-68, 1948.

²¹⁶ Thomas, *Sum. theo.* II, II, qu. 77, a. 1, ad 1.

²¹⁷ Hagenauer states categorically that the just price of Thomas cannot be the current price. She refers to a statement in the *Commentary to the Ethics* of prices set by buyers and sellers: *sed rebus pretia imponuntur, secundum quod homines indigent eis ad suum usum* (*Ethicorum*, Lib. V, Lect. IX, p. 270). To Hagenauer this *pretium impositum* is clearly the current price. In a statement concerning the sale of defective goods she finds evidence that this *pretium impositum* is opposed to the just price or true value of the goods: *Si ergo vitium rei venditae faciat rem minus valere quam pretium impositum a venditore, iniusta erit venditio unde peccat occultans vitium* (*Quodlib.* II, qu. V, art. 2, p. 32). She fails to notice that it is not the *pretium impositum* that makes the sale unjust, but the defective goods (*vitium rei*) placed on the market and demanding a price as if they were without defect. In the following sentence Thomas cites a case of a *pretium impositum* which was not unjust: *si autem (vitium) non faciat rem minus valere quam pretium impositum, quia forte venditor minus pretium imponit propter vitium, tunc, non peccat tacens vitium, quia venditio non est iniusta. . . .* (*Ibid.*) In the discussion of Thomas it was the hidden defect (*vitium*) and not the current price (*pretium impositum*) that made the sale unjust. Thomas, like a good Roman lawyer, knew that defects should not be hidden in contracts of sale or at least defective goods should

²⁰⁸ Thomas, *Sum. theo.* II, II, qu. 77, a. 4, ad 2.

²⁰⁹ *Ibid.* a. 2, ad 2. The origin of this passage is from Aristotle's *Ethics*, Lib. V, 7, (Moerbeke's Latin translation) in *Ethicorum*, p. 279. For Thomas' commentary to this passage see *ibid.* p. 281.

²¹⁰ E.g. Schreiber, *Die volkswirtschaftlichen Anschauungen*, 56-60.

²¹¹ Thomas, *Politicorum*, Lib. I, Lect. IX, p. 43.

²¹² Thomas, *Sum. theo.* II, II, qu. 77, a. 3, obj. 4.

²¹³ Cicero, *De officiis* III, 12, 49 ff.

²¹⁴ Thomas, *Sum. theo.* II, II, qu. 77, a. 3, ad 4.

Here market prices were actually approved; economic value depended solely on utility; the factors of labor and expenses were omitted from any discussion of value and used only to justify commercial profits necessary for the existence of society. As modern commentators such as Schreiber and Schilling have pointed out, Thomas probably did not clearly connect the two theories of the just price. Yet the two theories are not necessarily contradictory, and Thomas was close to a reconciliation even if it were not explicit in his writings. Value emphatically depends on utility according to Thomas, but exchange will not take place without adequate remuneration of labor and expenses. In other words, goods will not be produced below cost. Under competitive conditions, the current price tends to fluctuate around cost. If the current price falls below cost, some producers will drop out; if it rises above, others will be induced to supply the market. Cost is the competitive price in the long run. Perhaps it was Robert of Courçon of an earlier date who came close to making the solution explicit. He permitted the merchant to watch the markets closely until he could find a current price which would adequately compensate him for his costs and labor.²¹⁸ At any rate, shortly after Thomas Aquinas, Duns Scotus (d. 1308) made a closer connection between the current and the cost-of-production price, and has thereby received credit for an economic analysis close to the "Law of Cost" of the nineteenth century.²¹⁹

There also exists the problem of prices set by legally established authorities such as the officials of towns or guilds. Undoubtedly the Romanists, Canonists, and theologians were well aware of the considerable amount of official price regulation of their times. Peter Cantor, for example, referred approvingly to price regulation at Beauvais around the end of the twelfth century.²²⁰ The general problem of legal prices, however, was not fully developed by the legists or the theologians until the later Middle Ages. At that time it was added that the free market price could be superseded

not be sold at the current price of perfect goods. Cf. Hagenauer, *Das "justum pretium,"* 44, n. 109.

²¹⁸ See above, p. 71, n. 136.

²¹⁹ Schumpeter, *History of economic analysis*, 93. Duns Scotus, *Questiones in IV librum sententiarum* IV, 15, qu. 2, (14, 15, 22, 23) in *Opera* 18: 283, 317, 318. *Reportata Parisiensia* IV, 15, qu. 4, (19-23), in *Opera* 24: 238-240.

²²⁰ After discussing the role of the estimator and free prices at Paris (see above, p. 70), Peter Cantor turned to regulated Prices at Beauvais: Item alicubi est consuetudo quod episcopus in civitate sua ut belvaco. quancumque gallinam invenerit: habebit pro denario uno quadrigam plenam lignis: pro duobus denariis. cum valeat duos solidos qucumque calciamenta invenerit de cordubano: habebit pro quatuor denariis devacca: pro duobus denariis. Peccat ne accipiendo? Non fortasse. quia istud institutum est ex institutione est certum precium taxatum. Sed in superiori officio: non est precium taxatum. immo apreciator imponit precium quod vult. *Summa*, Paris Bibl. Nat. Lat. 9593, fol. 141^{ra} & ^b. For a general discussion of regulated prices based on German sources, see Kelter, *Die obrigkeitliche Preisregelung*.

by a duly instituted legal price.²²¹ It is possible, nonetheless, that the thinkers of the twelfth and thirteenth centuries implicitly considered the legal price as a part of the current or going price which was commonly estimated.

If, in general terms, the just price was the current or the legal price, what were unjust prices? How could one violate the going price? Although this was a valid question for Romanists and Canonists as well as theologians, it was probably Thomas Aquinas who gave fullest discussion to the problem. It is treated principally in the third element of his treatise on the just price in the *Summa*.²²² As we have seen, Thomas first summarily dealt with the element of fraud; then he considered the normal process of sale according to its substance (*secundum se*), in which he condensed the Aristotelian theory of exchange; and finally he turned to the third element of sale considered according to its secondary qualities (*per accidens*).

In this third manner the activity of sale is not considered according to the goods which are exchanged but according to the people who do the exchanging. The usefulness of the sale to some and the injury to others are the important factors. In a sale either the seller or the buyer may be in disadvantageous positions. A seller may incur unusual loss if he sells his goods, as for example, a man will suffer severe hardship if he sells his only coat. Similarly, a buyer may have unusual need for goods, as for example, a starving individual who has broken his leg and cannot get to the market to buy food. The individual disadvantage of either the buyer and or the seller has a tendency to raise the prices in the individual bargains above the level of the current market prices evaluated normally according to the goods themselves. The man with only one coat might sell it for a price higher than usual, and the starving and incapacitated man might pay more for his food than normally. Although both disadvantages raise the price, one is justified but the other is not. The seller at a disadvantage may justifiably raise his price because he is also selling the injury which he is suffering. On the other hand, the buyer in a disadvantageous position should not be compelled to purchase at a higher price, because the seller may not profit from a disadvantage which is not his own.²²³

The just price must consider not only the normal fair value of the goods, but also the special personal conditions of individual buyers and sellers. A disadvantage of a single seller which raises the price of goods above the current level is justified, but that of a buyer is not. Presumably if a disadvantage of a seller lowered the bargain price below the current price, this transaction also would be unfair. Accordingly,

²²¹ de Roover, *Quar. Jour. Econ.* 65: 496, 1951.

²²² Thomas, *Sum. theo.* II, II, qu. 77, a. 1, Resp. See above, p. 73.

²²³ *Ibid.* Cf. also the similar conclusion in *De malo*, qu. 13, art. 4, ad 7, in *Opera* (Freté and Maré) 13: 546.

an unjust price is one which profits from certain disadvantages. This price was later known as a *pretium affectionis*. The principle is as old as Classical Roman law which made price discrimination illegal. The formula that prices arise not from the whims or needs of single individuals, but are estimated commonly was repeated constantly by the Romanists and Canonists in the Middle Ages.²²⁴ Both the legists and the theologians distinguished between the prevailing current price (*communiter aestimatur*) and a price specially imposed on an individual. Prices should be the same to all. Where the legists and the theologians differed was that the lawyers legally permitted the price of any sale provided that it did not exceed the limits of one-half the current price. In contrast, the theologians attacked the price of any sale set in a private bargain which profited unfairly from individual disadvantages to differ from the current price.

The price estimated commonly was either the cur-

rent market price or the legal price imposed by a socially authorized official. As a consequence, private monopoly prices would be immoral. The examination of the problem of monopoly is beyond the bounds of this study, but it should be noted that from Roman and Carolingian times and throughout the Middle Ages monopoly profits were illicit.²²⁵ By definition the private monopolist was the sole producer, and by eliminating competition he was able to raise prices above the normal competitive level or the current price. Prices set by monopolists were thereby a kind of *pretium affectionis*. Disapproval of private monopoly prices was, in the final analysis, a logical corollary of the general principle that the just price was the current market price.²²⁶

²²⁵ E.g. C. 4, 59 and *Causa XIV*, q. 4, c. 9, *Quicumque*, see above, p. 33.

²²⁶ For the general subject of monopoly in the late Middle Ages, see Höffner, *Wirtschaftsethik und Monopole*, and de Roover, *Quar. Jour. Econ.* 65: 492-524, 1951.

²²⁴ See above, p. 21, p. 28, and p. 53 ff.

APPENDICES

A. THE QUESTION OF MONEY IN THE DETERMINATION OF PRICES

In modern economic analysis of prices one of the important factors is the quantity of money in circulation. Economists have shown that the processes of supply and demand also affect the value of money as goods, and hence prices. In the medieval discussions of the just price which have been studied almost never was the factor of the value of money considered. Did the thinkers of the twelfth and thirteenth centuries realize that the value of money could change and influence prices? Our purpose is not to study systematically the monetary theories of the Middle Ages, but merely to examine a few examples of this problem.

As an introduction to the discussion of the twelfth and thirteenth centuries certain ideas of Aristotle about the nature of money were pertinent and authoritative. To Aristotle, money was primarily a medium of exchange. Since it was merely a conventional means instituted by society for effecting the exchange of goods, it was not a natural source of wealth.¹ He considered that any attempt to produce wealth based on money, as for example by usury, was unlawful and against nature. Money was a barren source of legitimate profit.² Money was also valuable to exchange as a unit of account. It transformed the subjective qualitative phenomenon of want satisfaction into something objective and quantitative, made bargaining possible and facilitated justice in exchange. Finally, according to Aristotle money acted as a store of value eliminating the "double coincidence of want" and permitting parties to divide exchange into two transactions of selling and buying. Because of money one may sell at one time, store his exchange power in money, buy at a future time, and dispose of a part or all of his accumulated exchange power. Aristotle realized that money itself might vary in future value, thus increasing or diminishing its accumulation of exchange power, but he felt that money still possessed a more permanent nature than the commodities it generally represented.³

At the end of the twelfth century the theologian Peter Cantor in an interesting discussion of royal regulation of currency recognized that it was possible to meddle with the value of money. He cited the case of a king who increased the value of new money, and posed the ethical question whether it was immoral or not. If the king doubled the value of the new money, then the *census* debts contracted in terms of the former money would obligate the debtors to pay twice the value in the new money. Peter decided that just as it was immoral for the king to double the feudal

services of his vassals, so would it be sinful to double the *census* obligations of peasants by such currency manipulation. The value of money should remain stable.⁴ The Canonist William of Rennes in the middle of the thirteenth century also realized that the value of money could fluctuate from time to time just as the value of goods. In a discussion of usury he stated that just as it is usurious to speculate on the certain and assured fluctuations of goods, so it is usurious to speculate on the similar phenomena of money. As in all speculative sales, transactions in money in which the outcome is not certain of gain are cleared of the charge of usury by reason of doubt.⁵ Perhaps, because of these variances in the value of money, Radulphus Ardens defined the just price chiefly in terms of a genuine and secure currency.⁶

The attitude of the theologians of the thirteenth century towards the question of the monetary influences in prices was more developed in the writings of Thomas Aquinas. In his *Commentary to the Ethics*, after treating the theory of the origin of money as an expression of human need, Thomas went on to rehearse Aristotle's theories of money. Because of the rare occurrence of the "double coincidence of want," money acts as a storage of value to effect future exchanges. Money allows men to wait, and for that reason it should remain at the same value. As a matter of fact, the value of money is not always stable, but it should be instituted so that it is more stable in value than other things.⁷ In summary of the attitude towards currency and price in the thirteenth century, Thomas Aquinas realized fully that the value of money fluctuated, but, as Aristotle, he did not include currency as an important factor in his discussion of the just price, be-

⁴ Item esto quod terra aliqua debeat censum alicui principi. et ille princeps augeat monetam in dupplum precium. est ne peccatum si recipiat a rusticis tot solidos quot prius? Videtur quia .c. solidi de nova moneta valent .cc. de veteri. Preterea si rustici deberent .c. modios frumenti de terra sua, et princeps augeret modium in dupplum. non posset petere .c. modios maiores. Quare non est simile de moneta augmentata? De debitis et pensionibus certum est quod si deberem .c. solidos de pensione vel debito. si augetur precium monete: non redderem tibi nisi tantum quantum valebant .c. solidi tunc quando intervenit internos contractus. Quare non erit sic et de censu? Item. Non posset princeps augere servicium feodorum. ut si alias miles debeat de feodo suo militare in exercitu principis propriis expensis per mensem. non potest princeps instituere ut militet per duos menses. Quare ergo potius sine peccato potest mutare statum et quantitatem census rusticorum? Videtur nobis quod peccaret princeps mortaliter si exigeret a subditis de nova moneta: nisi tantum quantum valebat priora moneta. Peter Cantor, *Summa*, Paris Bibl. Nat. Lat. 9593, fol. 167^{vb}, 168^{ra}.

⁵ William of Rennes, *Glossa*, to *versimiliter dubitatur: Summa Raymundi* II, 7, par. 3, p. 228, 229.

⁶ For the text, see above, p. 69, n. 123.

⁷ Thomas, *Ethicorum*, Lib. V, Lect. IX, p. 271. Cf. Endemann, *Studien* 2: 34.

¹ Aristotle, *Politics* I, 1257a-1258a.

² *Ibid.* 1258b. Cf. Soudek, *Proc. Amer. Philos. Soc.* 96: 68-70, 1952.

³ Aristotle, *Ethics* V, 1113b.

cause he felt that in general the value of money was stable enough, or at least more stable than anything else.⁸

B. BIOGRAPHICAL NOTES ON AUTHORS OF THE TWELFTH AND THIRTEENTH CENTURIES

The following notes are designed to provide brief indications concerning the careers of authors important for the just price in the twelfth and thirteenth centuries. No attempt has been made to list all of their writings but merely those relevant to this study.

The standard history of the study of Roman law in the Middle Ages is Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 7v. Heidelberg, Second edition, 1834–1851. Although comprehensive in scope, it is outdated and must be corrected with more recent accounts. The results of recent scholarly research on the medieval Romanists are widely dispersed throughout periodical literature, but a guide to the Romanists of the twelfth century may be found in the somewhat controversial Hermann Kantorowicz, *Studies in the Glossators of the Roman Law*, Cambridge, University Press, 1938.

A valuable manual of historical information and bibliography for the study of Canon law in all periods is A. Van Hove, *Prolegomena (Commentarium Lovaniense in codicem juris canonici*, I, i), Malines, Rome, H. Dessain, 1945. Johan Friedrich von Schulte, *Die Geschichte der Quellen und Literatur des canonischen Rechts von Gratian bis auf die Gegenwart*, 3v. Stuttgart, 1875–1880, is the standard but somewhat outdated authority on the medieval Canonists. The indispensable guide for the manuscript material between 1140 and 1234 and also an excellent introduction to the background of the Canonists is Stephan Kuttner, *Repertorium der Kanonistik*, Vatican, Bibliotheca Apostolica Vaticana, 1937. A recent bibliographical note on the Canonists may be found in Brian Tierney, *Foundations of the Conciliar Theory*, 254, 255, Cambridge, University Press, 1955.

Widely dispersed information about the medieval theologians may be more conveniently found in A. Vacant and E. Mangenot, ed., *Dictionnaire de théologie catholique*, 16v. Paris, Letouzey et Ané, 1908—. Three important guides to the manuscripts of the theologians are P. Glorieux, *Répertoire des maitres en théologie de Paris au XIII^e siècle*, 2v. Paris, Vrin, 1933, 1934;

⁸ Noonan bases his analysis of the medieval theories of usury upon the principle that the Scholastics considered only the legal value of money, that is, its official value fixed by political authority, which was formal, stable, and independent of the influence of supply and demand. If this analysis is correct, it would offer another possible explanation why the factor of money played a minimum role in the medieval discussions of price. Nonetheless, as has been pointed out, the medieval thinkers did realize that the value of money in fact fluctuated with the market. Cf. Noonan, *Scholastic analysis of usury*, 52, 53, 67, 68, 81, and 93.

Friedrich Stegmüller, *Repertorium commentariorum in sententias Petri Lombardi*, 2v. Würzburg, F. Schönigh, 1947; and Artur M. Landgraf, *Einführung in die Geschichte der theologischen Literatur der Frühscholastik*, Regensburg, Gregorius, 1948.

Abbas Antiquus (or **Bernard of Montemirato**, d. 1296). Professor of Canon law at Bologna and Benedictine administrator. A student of Peter of Sampsona, he wrote a *Lectura in Decretales Gregorii IX* (1259–1266) before embarking upon his monastic and ecclesiastical career.

Abelard (d. 1142). Controversial professor of dialectics and theology who flourished at Paris in the first half of the twelfth century. Among his works on theology and philosophy was the unfinished *Dialogus inter philosophum, judaeum, et christianum* written at the close of his career.

Accursius (d. 1263). The compiler of the influential *Glossa ordinaria* to Roman law. A Florentine by origin, a student of Azo and a follower of the *ius strictum* school of Bulgarus, he became a celebrated Romanist at Bologna. His gloss to the complete text of Justinian, probably completed by 1228 or perhaps shortly before his death, popularized the influence of Azo and became an important interpretation of Roman law by the middle of the thirteenth century.

Alanus Anglicus (fl. early thirteenth century). English professor of Canon law at Bologna. He wrote an important apparatus to *Compilatio I* (1201–1210) and perhaps was responsible for the *Apparatus Ius Naturale* (1210–1215) to the *Decretum*.

Albericus (fl. 1165–1194). Professor of Roman law at Bologna. The probable final editor of the “Hugo-Albericus” collection of *distinctiones* which were possibly first assembled by Hugo of Porta Ravennate. A *distinctio* was a specialized treatise devoted to a single issue of jurisprudence under controversy and discussion.

Albert the Great (d. 1280). German Dominican professor of theology principally in Paris and in Germany (1228–1260) and Bishop of Ratisbon (1260). Among his massive production of works were the *Summa de bono* (1236, 1237?), the *Commentary to the Sentences* (1244–1249), and the *Commentaries to the Ethics and Politics* of Aristotle composed sometime between 1254 and 1270.

Alexander III (Roland Bandinelli d. 1181). Canonist, theologian, and pope. A student of both law and theology at Bologna, he had direct contact with Gratian and was either a professor there (ca. 1140–1148) or a Canon of Pisa. During this early period he wrote a *Stroma* or *Summa* to the *Decretum* of Gratian (ante 1148) and a book of *Sentences* in theology (1149–1150). Cardinal deacon (1150), Cardinal priest (1151), Chancellor of the Roman

- Church (1153), he was elected to the Papacy in 1159 and during his long pontificate published numerous decretals important for Canon law.
- Alexander of Hales** (d. 1245). Englishman and first regent professor of theology at the Franciscan convent in Paris (1231–1238). His *Summa theologica*, which, according to Roger Bacon, “was heavier than a horse and was not made by him but by others” was actually begun by Alexander in the 1230’s and 1240’s and continued by his followers.
- Anselm of Canterbury** (d. 1109). Italian monk, Abbot of Bec in Normandy, and Archbishop of Canterbury (1093–1109). During his career at Bec he composed a number of philosophical and theological treatises, including a *Dialogus de veritate*.
- Apparatus: Ius Naturale** (1210–1215). Anonymous apparatus to the *Decretum* of Gratian composed at Bologna. Some support has been found for the authorship of Alanus Anglicus.
- Azo** (fl. ca. 1210). Influential professor of Roman law at Bologna. A student of Johannes Bassianus, he became the brilliant defender of the *ius strictum* school of Bulgarus. Among his works the *Summa codicis* and *Lectura in codicem*, composed ca. 1210, marked the turning point in the development of many doctrines of Roman law.
- Bartholomew of Brescia** (d. 1258). Professor of Canon law at Bologna. A student of Hugolinus and Tancredus, he composed the *Quaestiones dominicales et veneriales* (ca. 1234–1241) and ca. 1240–1246 he revised and modernized the *Glossa ordinaria* of Johannes Teutonicus to the *Decretum* of Gratian. His edition of the *Gloss* is the one printed with the *Decretum*.
- Bernard Balbi of Pavia** (d. 1213). Canonist, Bishop of Faenza, and of Pavia. Before his episcopal career he was professor at Bologna and Provost of Pavia when he published the *Compilatio I* (post. 1191), an influential collection of decretals. Between 1191 and 1198 he also wrote an important *Summa decretalium*.
- Bernard Botone of Parma** (d. 1266). Professor of Canon law and Canon at Bologna. Among his works may be mentioned a *Casus longi* and *Summa titulorum*, and most important, the *Glossa ordinaria* to the *Decretales* of Gregory IX, begun as early as ca. 1241.
- Bernard of Clairvaux** (d. 1153). Early Cistercian monk and influential abbot of Clairvaux (1115–1153). His written works chiefly included numerous sermons and letters.
- Bernard of Montemirato**, see *Abbas Antiquus*.
- Bonaguida of Arezzo** (fl. ca. 1250). Lawyer at the Roman court and later judge and professor of Canon law at Arezzo. Around 1250 he wrote the *Summa introductoria super officio advocacionis in foro ecclesiae*, a manual and guide to legal procedure in ecclesiastical courts.
- Bonaventura** (d. 1274). Italian professor of theology at Paris (fl. 1250–1257), General of the Franciscan order (1257), Cardinal (1273), and distinguished doctor of the Franciscans. His most outstanding work was his *Commentary to the Sentences* written 1250–1251.
- Bulgarus** (d. 1166). The senior member of the Four Doctors of Roman law. A dominating professor at Bologna, he wrote largely between 1115 and 1165 and initiated the orthodox school of interpretation, the *ius strictum*, which emphasized the limited and literal interpretation of the law. Among his extant works are a *De dolo* and a *De diversis regulis*.
- Damasus** (fl. early thirteenth century). Canonist of either Hungarian or Italian origin. Despite disputes concerning his origins, he was a professor at Bologna where he made additions to the *Glossa ordinaria* of *Compilatio I* (ca. 1215) and *Compilatio II* and composed a *Summa decretalium* (ante 1215) and a collection of *Quaestiones* about the same time.
- Four Doctors**. The four original students of Irnerius, who flourished in the early twelfth century: Bulgarus, Martinus, Hugo of Porta Ravennate, and Jacobus.
- Giles of Lessines** (d. post 1304). Dominican student of Albert the Great and Thomas Aquinas, and perhaps professor of theology at Paris after 1270. His *De usuris* composed between 1277 and 1285, has been erroneously included among the works of Thomas Aquinas.
- Godfrey of Poitiers** (fl. 1225?). Professor of theology at Paris. Almost nothing is known of his career, but his *Summa* indicates the influence of Stephen Langton.
- Goffredus of Trani** (d. 1245). Professor of Roman Law at Naples and later of Canon law at Bologna. Although originally a student of Azo, he became primarily a Canonist and was rewarded with the Cardinal-diaconate of St. Hadrian (1244). His *Summa in titulos decretalium* was written between 1241 and 1243.
- Gratian** (d. ante 1159?). The father of the study of medieval Canon law. Other than that he was a monk of the Camaldulensian monastery of St. Felix at Bologna, little is known of his life. The salient and sole testimonies of his work are his initiation of a collection of Canon law ca. 1140 most commonly known as the *Decretum* and his founding of a school of Canonists at Bologna.
- Gregory IX** (Ugolino de Segni, d. 1241). Influential Cardinal under Innocent III and Honorius III and Roman Pontiff (1227–1241). By training a Canonist himself, he commissioned his Chaplain Raymond of Peñafort to compile a definitive edition of *Decretales* which he officially promulgated in 1234.

- Gui de l'Aumône** (fl. ca. 1260). Abbot of l'Aumône and first Cistercian regent professor of theology at Paris. He wrote his *Summa de diversis questionibus theologiae* sometime after 1256 when he received his theological degree.
- Hostiensis** (Henry of Susa, d. 1271). The most celebrated of Canonists of the mid-thirteenth century, whose fame was perpetuated, although not too favorably, by Matthew Paris and Dante. A student of Jacobus Balduinus and Jacobus de Albenga at Bologna, he was professor of Canon law at Paris, Bishop of Sisteron in 1244, Archbishop of Embrun in 1250, and Cardinal-bishop of Ostia (whence his name) in 1261. Among his works was the *Summa aurea*, written between 1250 and 1253 and of great importance for the development of both Roman and Canon law, and a *Decretalium librum commentaria*, written between 1270 and 1271.
- Hugh of Saint Cher** (d. 1263). Regent professor of theology in the Dominican convent at Paris (1230–1235), and Cardinal (1244). Among his works was a *Commentary to the Sentences* written 1230–1232.
- Hugh of Saint Victor** (d. 1141). Theologian and mystic at the Abbey of St. Victor in Paris. Among his numerous Scriptural and theological treatises was the *De fructibus carnis et spiritus*.
- Hugolinus** (d. post 1233). Professor of Roman law at Bologna. A follower of the school of Bulgarus, he studied under Johannes Bassianus and was a contemporary colleague of Azo. To him has been falsely attributed a collection of *Dissensiones dominorum*, which were opinions of the famous Romanists *pro* and *con* certain specific points of law, prompted by the debates between the schools of Bulgarus and Martinus.
- Huguccio** (d. 1210). The most important Canonist of the twelfth century. A professor at Bologna, he later was elected Bishop of Ferrara (1190). His *Summa* to the *Decretum* composed ca. 1188 was a masterpiece in size, method, comprehensiveness and influence on Canonists of the following century.
- Innocent III** (Lothaire de Segni, d. 1216). Influential Cardinal (1190) and Pope (1198–1216). A student of theology at Paris and of law under Huguccio at Bologna, he produced during his pontificate numerous decretals important for the development of medieval Canon law.
- Innocent IV** (Sinibaldo Fieschi d. 1254). Roman pontiff and important Canonist. A student of both Roman and Canon law at Bologna, he became a professor at Bologna before embarking on his ecclesiastical career as Canon of Parma, Cardinal of St. Laurentius, Bishop of Albenga, and Pope (1243). Sometime between 1246 and 1253 while Pope he composed an *Apparatus (seu commentaria) super quinque libris decretalium*.
- Irnerius** (d. 1130?). Traditionally acknowledged as the "father of medieval Roman law." He was the originator of the revival of Roman law studies at Bologna in the late eleventh century. Most of his writings have been lost except for two small treatises and a great number of short glosses to the text of Justinian.
- Jacques de Vitry** (d. 1240). Student at Paris (from 1187), Bishop of Acre (1216), and Cardinal (1228). His letters, sermons and accounts give a vivid picture of his times.
- Jean de la Rochelle** (d. 1245). Student of Alexander of Hales and his successor to the Franciscan chair of theology at Paris (1238–1245). Among his works are a *Summa de virtutibus* and a *Summa de vitiis*.
- Johannes Bassianus** (d. 1197). Alleged to be the first influential *doctor juris utriusque* or professor of both Roman and Canon law at Bologna. In Roman law he was a staunch supporter of Bulgarus and *ius strictum*. A Canon in the cathedral of Bologna, he also wrote treatises on Canon law. Extant manuscripts of his Romanist writings, particularly his *Summa codicis*, are scarce, and he must be known chiefly through the works of his pupils.
- Johannes de Deo** (fl. ca. 1250). Spanish professor of Canon law at Bologna (ca. 1247–1253). Among two dozen or more works ascribed to him are his *Summa super certis casibus decretalium* and his *Liber poenitentiarius*.
- Johannes Faventinus** (d. 1190 or 1220?). A professor of Canon law at Bologna and later either Canon or Bishop of Faenza. His *Summa* to the *Decretum* written shortly after 1171 was heavily dependent on Rufinus and Stephen of Tournai, but was widely known through numerous manuscripts.
- Johannes Teutonicus** (d. 1246). Provost of Goslar and Halberstadt and prolific Canonist. A former student of Azo at Bologna, he possibly compiled *Compilatio IV* and most certainly its *Glossa ordinaria* (ca. 1217). He also wrote an apparatus to *Compilatio III* (ca. 1217) and, most important, the *Glossa ordinaria* to the *Decretum* shortly after 1215.
- Karolus de Tocco**. A Romanist and contemporary of Azo.
- Laurentius Hispanus** (d. 1248). Canonist and Bishop of Orense in Spain. A student of Azo and a professor at Bologna, he wrote an apparatus to *Compilatio I* (ante 1215), *III* (ante 1215), and to the *Decretum* of Gratian (1210–1215).
- Lo Codi** (ca. 1150). A popular adaptation of the *Summa Trecensis*, written in Provençal dialect. It in turn was translated back into Latin.
- Martinus** (fl. ca. 1150). One of the Four Doctors of Roman Law at Bologna. A younger contemporary he opposed the *ius strictum* of Bulgarus by initiating a school of interpretation which espoused equity or a more flexible interpretation of the law by allowing greater discretion to the judge.

- Monaldus** (d. ca. 1288?). Franciscan author whose exact identity is difficult to ascertain. Before 1274 he composed a guide to confessors, the *Summa perutilis* or the *Summa de iure tractans*, which was arranged alphabetically.
- Moralium Dogma Philosophorum** (variously dated from ca. 1153 to 1170). A systematic treatise on moral philosophy largely dependent on Cicero and Seneca. The authorship generally attributed to William of Conches (d. 1154?) is currently under dispute and has been more recently assigned to Walter of Châtillon (d. ca. 1190). Latest discussion leaves the problem unresolved.
- Odo Rigaldus** (d. 1275). Successor to Jean de la Rochelle in the Franciscan chair of theology at Paris (1245–1247) and Archbishop of Rouen (1248–1275). He wrote a *Commentary to the Sentences*.
- Odofredus** (d. 1265). Professor of Roman law at Bologna. He was a student of Jacobus Balduinus, Hugolinus, and perhaps of Accursius, and became a partisan of the *ius strictum* faction of Bulgarus. Among his writings was an influential *Lectura codicis*, which with the *Glossa ordinaria* of Accursius best represents the progress of Roman law by the middle of the thirteenth century.
- Peter Cantor** (d. 1197). Chanter of Notre Dame of Paris and professor of theology. Primarily interested in Scriptural studies and practical moral theology, he wrote a *Summa de sacramentis et anime consiliis* and a *Distinctiones Abel*.
- Peter Lombard** (d. 1160). Italian professor of theology at Paris and later Bishop of Paris (1159). His most important work was the *Sententiarum quatuor libri* (1150–1151) which became a standard medieval textbook in theology.
- Peter of Salins** (fl. ca. 1250). Canon of Besançon and chaplain to Hugh of Saint Cher. He wrote a *Lectura super decreto* which is based largely on the *Gloss* of Bartholomew of Brescia.
- Peter of Sampsona** (fl. ca. 1250). French professor of Canon law at Bologna (1230–1260). A student of Bernard Balbi of Pavia, Odofredus, and Accursius, he composed ca. 1267 some *Distinctiones* based on the *Decretales*.
- Peter of Tarentaise** (Pope Innocent V, d. 1276). Dominican student and professor of theology at Paris, Archbishop of Lyon (1272), Cardinal (1273), and Pope (1276). As a result of his Parisian instruction, he composed a *Commentary to the Sentences* (1257–1259).
- Philip the Chancellor** (d. 1236). Professor of theology at Paris (1210) and Chancellor of Notre Dame (1218). His *Summa* depends heavily on the work of William of Auxerre.
- Pillius** (d. 1198). Student of Placentinus and a follower of the school of Martinus. Among his works important for both Roman and Canon law was a *Libellus de preparatoriis litium et earum preambulis*.
- Placentinus** (d. 1191). Controversial professor of Roman law and principal champion of the school of Martinus. A student of Rogerius at Bologna, he later taught at Mantua and after ca. 1170 at Montpellier. Among his works were an important *Summa codicis* and some additions to the *De diversis regulis* of Bulgarus.
- Radulphus Ardens** (d. ca. 1215?). Professor of theology at Paris (1179–1215) and partisan of the school of Gilbert de la Porrée. During his career at Paris he composed a *Speculum universale* which dealt mainly with ethical problems.
- Raymond of Peñafort** (d. 1275). Compiler of the *Decretales* of Gregory IX. A Dominican, a chaplain and *poenitentiarius* of the pope, he was commissioned by Gregory IX in 1230 to make an official collection of papal decretals, which he completed in 1234. He also composed an influential guide to confessors, the *Summa de casibus*, between 1220 and 1227 and later revised it after 1234.
- Robert of Courçon** (d. 1219). English Canon of Noyon and Paris and controversial Cardinal-legate for France. A student of Peter Cantor, he wrote his *Summa* between 1204 and 1208 during his academic career at Paris.
- Rogerius** (d. ca. 1170). Professor of Roman law and author of a *Summa codicis*. Modern scholarly controversy cannot agree whether he studied principally under Martinus or Bulgarus at Bologna, and to whose camp he belonged. He taught at Bologna beginning in the second quarter of the twelfth century, and shortly after 1162 he appears to have founded the law school at Montpellier.
- Rufinus**. Influential Canonist of the second half of the twelfth century. A professor at Bologna, he wrote an important *Summa* to the *Decretum* (1157–59). He later became Bishop of Assisi (1179) and Archbishop of Sorrento (1180).
- Sicardus of Cremona** (d. 1215). Canonist and later Bishop of Cremona (1185–1215). His *Summa* to the *Decretum* composed 1179–1181 was an important systematic and didactic manual of Canon law.
- Simon of Bisignano** (d. 1215). Canonist and direct student of Gratian. An independent thinker, he wrote a *Summa* to the *Decretum* between 1177 and 1179.
- Stemma Bulgaricum** (ca. 1170). The earliest family of manuscripts containing *quaestiones disputatae* and originating from the influence of Bulgarus. A *quaestio disputata* was an account of a fictitious legal suit performed by students of the Four Doctors, adjudicated by the Doctors themselves, and recorded by an authorized student known as a *reportator*.
- Stephen Langton** (d. 1228). English Canon of Notre Dame of Paris, Cardinal, and Archbishop of Canterbury. While a professor in Paris he was interested in Scriptural and ethical problems, and wrote several *Summae* or *Quaestiones* before 1200.

Stephen of Tournai (d. 1203). Canonist and theologian. Born at Orleans, he studied at Bologna (1145–1150) and at Chartres (1155–1158?), became Abbot of Ste. Geneviève at Paris (1176–1191), and finally was elected Bishop of Tournai (1191). He wrote a *Summa* to the *Decretum* in the 1160's.

Summa: Cum in Tres Partes. Anonymous twelfth century *summa* to the *Decretum* which contains many parallel passages to the *Summa: Quoniam status ecclesiarum*.

Summa: Quoniam Status Ecclesiarum. Anonymous *summa* to the *Decretum* written between 1160 and 1171, originating either from Bologna or from France, and strongly dependent on the *Summae* of Stephen of Tournai and Roland Bandinelli.

Summa: Tractatus Magister. Anonymous *Summa* to the *Decretum* written 1175–1191 by the French school of Canonists.

Summa Trecensis (ca. 1150). *Summa* to the Code of Justinian of the Bolognese school. Its authorship is still disputed by modern scholars. Some hold it to belong to the school of Martinus; others claim it to be the preliminary redaction of the *Summa codicis* of Rogerius. Its attribution to the pen of Irnerius, assigned by its editor, Hermann Fitting, can no longer be accepted.

Tancredus (d. 1234–1236). Professor, Canon, and Archdeacon of Bologna. He was responsible for the *Glossa ordinaria* to *Compilationes I* (1210–1215), *II* (ca. 1215–1220), and *III* (c. 1220), and also an apparatus to *Compilatio V*.

Thomas Aquinas (d. 1274). Student of Albert the Great, professor of theology who taught in Paris and Italy, and most distinguished doctor of the Dominican order. Among his voluminous works were the *Commentary to the Sentences* (1253–1257), *De emptione et venditione ad tempus* (1262), the *Commentaries* to the *Ethics* (1266) and the *Politics* (1272) of

Aristotle, *De malo* (1269–1272), *Quaestio quodlibetalis II* (1269–1272), and the *Summa theologiae* (Pars II–II, 1271–1272).

Thomas Chabham (fl. ca. 1220). English Dean of Salisbury and professor of theology at Paris from 1212. Between 1215 and 1226 he wrote a *Poenitentiale* which treated practical questions of morality. He is not to be confused with his namesake who was Bishop of Worcester in 1313.

Vacarius (fl. 1145). Lombard jurist who was brought by Archbishop Theobald of Canterbury to teach in England during the reign of King Stephen. Around 1149 he wrote the *Liber pauperum*, a “poor students” abbreviation of the Justinian texts with certain glossary remarks. He sympathized with the school of Martinus.

Vincent of Beauvais (d. 1264). Dominican encyclopedist. Through the patronage of King Louis IX of France and the use of the royal library, Vincent was able to compile ca. 1244 his well-known encyclopedia, *Speculum maius*, of which the volume *Speculum doctrinale* treats canonistic and theological matters.

Vincentius Hispanus (d. 1248). Canonist and Bishop of Idanha-Guarda in Portugal. At Bologna he studied Roman law under Accursius. Among his more important works may be found an apparatus to *Compilatio III* (before 1215) and to the *Decretales* of Gregory IX (shortly after 1234).

William of Auxerre (d. 1231). Professor of theology at Paris (1219–1231). Around 1220 he wrote the *Summa aurea*, a systematic discussion of theological questions based on the organization of the *Sentences* of Peter Lombard.

William of Rennes (fl. ca. 1250). Dominican Canonist at Dinan. Between 1241 and 1250 he composed an important gloss to the *Summa de casibus* of Raymond of Peñafort, which has been erroneously printed under the name of Johannes of Fribourg.

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